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No. [redacted]

IN THE
Supreme Court of the United States
October Term, 1999

ROBERTO TEFEL ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the lower court correct in determining that due process is not violated where there is a denial of a statutory right to apply for a benefit, simply because the granting of the benefit is discretionary?

2. Whether "affirmative misconduct" is an additional element before there can be a finding of estoppel against the Government and, if so, whether the Government did not commit "affirmative misconduct" even though it induced a class of persons to apply for a benefit, pay fees to the Government, and give up other statutory benefits without disclosing that the benefit would be withdrawn under proposed legislation and that the agency itself, in adjudicatory proceedings it was conducting, took the position that the benefit should be withdrawn?

LIST OF PARTIES

Petitioners Roberto Tefel, et al. were appellees below. Janet Reno, Attorney General of the United States, et al., were appellants below.

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PETITION FOR WRIT OF CERTIORARI

Roberto Tefel, et al., appellees below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which vacated the district court's entry of a class-wide preliminary injunction and reversed the denial of the motion to dissolve the injunction.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals (Pet. App. A at 1a) was entered on July 14, 1999 and is found at 180 F.3d 1286 (11th Cir. 1999). The opinion of the district court (Pet. App. C, at 89a) denying the motion to dissolve the injunction was entered on February 10, 1998 and is found at 996 F. Supp. 1 (S.D. Fla. 1998). The opinion and order of the district court granting the preliminary injunction (Pet. App. B, at 37a) was entered June 24, 1997 and is found at 972 F. Supp. 623 (S.D. Fla. 1997).

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1999. A petition for rehearing and rehearing *en banc* was denied on October 6, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1). The time for filing this petition was extended to February 3, 2000, by Order of the Hon. Anthony M. Kennedy, dated December 30, 1999.

SUMMARY OF ARGUMENT

Certiorari is warranted in this case, as the Eleventh Circuit's rejection of the district court's finding that petitioners' due process claim was likely to succeed is contrary to Supreme Court precedent and in conflict with other Circuits. The payment of fees for the right to apply for a suspension of deportation, the government's conduct in inducing and misleading applicants to abandon other avenues of relief now unavailable, and the actual abandonment of the right to seek asylum as a result of this Government inducement, justify a) the finding that class members possess a constitutionally cognizable property interest in applications for suspension of deportation, b) the conclusion that it is likely that petitioners will succeed on the merits of petitioners' due process claim, and c) the entry of an order enjoining enforcement of relevant immigration provisions.

Certiorari is further warranted in this case as the Eleventh Circuit's rejection of the district court's finding that petitioners' estoppel claim was likely to succeed, is also inconsistent with Supreme Court precedent and in conflict with other Circuits. The Eleventh Circuit's rejection of petitioners' claim that Immigration and Naturalization Service conduct gave rise to estoppel erroneously relies on the premise that Supreme Court precedent and precedent set by other Circuits requires such a result. In fact, the estoppel doctrine admits of such widely varying positions among the Circuits that guidance from the Supreme Court is appropriate

to allow for the fair adjudication of seminal cases, such as that facing the forty thousand petitioners in this case.

STATEMENT OF FACTS AND PROCEEDINGS

The facts of this case are far from ordinary. Based on the detailed evidence presented below by the petitioners in connection with their motion for a preliminary injunction against the U.S. Immigration and Naturalization Service ("INS"), the United States District Court for the Southern District of Florida found that "[s]eldom, if ever, has such a dramatic, heartrending and powerfully persuasive case of irreparable harm to literally tens of thousands of human beings been presented to this [F]ederal [C]ourt." Petition Appendix B (Pet. App. B at 74a). Over forty thousand individuals are in the plaintiff class. Except for certain class members, they are facing deportation back to potentially life-threatening situations purely because they acted in accordance with advice *affirmatively publicized by the INS* in the media and elsewhere. As a result, they abandoned their previous immigration status, or, in many cases, their applications for political asylum, in order to seek the benefit of a suspension of deportation. Now, the INS has *retroactively* applied new rules of eligibility for suspension in a manner that prevents the Petitioners from qualifying therefor and leaves them without remedy, facing forcible removal from the United States.

While the award of suspension of deportation is indisputably committed to the discretion of the Attorney General, the INS' withdrawal of the right even to *seek* a suspension of deportation represents an improper denial of the most basic procedural due process that was formerly available. The fact that the petitioners were led into this denial of rights by affirmative, misleading acts by the INS represents grounds for estoppel. The district court properly recognized the strength of these claims and granted petitioners a preliminary injunction. As will be shown below, the Eleventh Circuit's rejection of these claims as a matter of law,

and its dissolution of the preliminary injunction, conflicts with and misapplies precedent enunciated by this Court and other Circuits.

1. THE IMMIGRATION AND NATURALIZATION SERVICE'S AFFIRMATIVE ENCOURAGEMENT OF THE PETITIONER CLASS TO SEEK SUSPENSION OF DEPORTATION

The history of this matter begins with the affirmative actions of the INS with regard to the petitioner class. Those actions included offering work authorizations automatically to people who filed motions to reopen, lowering the standard for motions to reopen, and widely disseminating information throughout the mass media to encourage class members, particularly Nicaraguans, to come forward. *Id.* at 59a-65a. There was a five hundred and fifty-seven percent (557%) increase in applications as a result of the Government's efforts. *Id.* at 63a. Nicaraguans, alone, spent between $1.1 million and $1.7 million in application fees. *Id.* at 64a. Many of them "gave up their right to continue to seek political asylum in the United States." *Id.* Immigrants of other nationalities also gave up their right to seek political asylum on the representation that they could apply for suspension of deportation. *Id.* at 79a. For instance, Khadijeh Aidinezhad, an Iranian woman and named plaintiff, abandoned her claim for political asylum after it had been reopened by the Board of Immigration Appeals, because the INS informed the class of their ability to file for suspension of deportation. *Id.* at 79a. This ability was subsequently withdrawn by the INS' retroactive change of position, but that shift did not retroactively reinstate her asylum claim.

As the district court found, the INS induced and encouraged class members to come forward to apply for suspension of deportation "with knowledge that Congress was considering drastic changes in the suspension laws which would eliminate the right of Nicaraguans to obtain suspension." *Id.* at 69a. Detailed documentary and testimonial evidence supporting the district court's conclusion

showed that the INS itself was *lobbying* for these changes, *while encouraging* the class to seek a suspension of deportation. *Id.* at 69a-70a.

Subsequently, the law regarding suspension of deportation *was* changed. Previously, an individual could be eligible to apply for suspension after seven years of continuous physical presence in the United States and could count time in the U.S. accruing *after* the commencement of deportation proceedings as part of that seven years. Then, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which eliminated the right to seek a suspension of deportation after April 1, 1997, and replaced it with a process called "cancellation of removal," which involved significantly different requirements. Pub L. No. 104-208, Div. C. The Board of Immigration Appeals ("BIA"), in *Matter of N-J-B*, interpreted certain ambiguous implementing provisions of IIRIRA as applying retroactively to suspension of deportation proceedings, and it then imposed an administratively crafted "stop-time" rule that prevented an applicant who filed for suspension of deportation *before* the enactment of IIRIRA from counting time accruing after the commencement of proceedings as part of his or her period of continuous physical presence. Congress passed a subsequent law, the Nicaraguan Adjustment and Central American Relief Act of 1997 ("NACARA"), amending the statute by imposing the retroactive stop-time rule to reflect the BIA's interpretation. Pub. L. No. 105-100, 111 Stat. 2160, Tit. II, Div. A, as amended by P. L. No. 105-139, 111 Stat. 2644.

2. THE INITIAL COMPLAINT AND THE TEMPORARY RESTRAINING ORDER

The INS overstepped the mandate of IIRIRA, however, when it attempted to impose the stop-time rule retroactively to deny suspension to the very individuals whom it had actively encouraged to step forward and abandon other claims (such as political asylum) in favor of the right to seek suspension. It was this unfair mis-application of the law, among other

actions announced in the BIA's published decision in *Matter of N-J-B*, that precipitated the commencement of this action on March 28, 1997 by the filing in the United States District Court for the Southern District of Florida of a verified class action complaint seeking declaratory, injunctive and mandatory relief and writ of habeas corpus. Petition Appendix B (Pet. App. B). Plaintiffs sought an injunction to prevent the enforcement of the INS' policy that retroactively barred persons in the States of Florida, Georgia and Alabama from applying for suspension of deportation based upon a "stop-time rule" that cut off their right to seek suspension of deportation when an order to show cause (the charging document of the INS) was served on them. The complaint challenged the stop-time rule asserting statutory and constitutional claims, including violations of the due process and equal protection.

On April 17, 1997, "after class members received letters to report for deportation, [p]laintiffs filed an application for a temporary restraining order and a motion for provisional class certification." Pet. App. B at 41a. On May 14, 1997, at the conclusion of an evidentiary hearing, the Court orally entered a detailed temporary restraining order ("TRO"), *id.* at 41a-42a, recognizing that class members are subject to immediate deportation because there was no stay in effect. On May 20, 1997, the district court certified the class and granted a TRO in a written order. *Id.* at 41a.

3. PRELIMINARY INJUNCTION

A Magistrate Judge first determined that a preliminary injunction was necessary but left the issue of likelihood of success to the district court. On June 24, 1997, the district court entered a sixty-five (65) page preliminary injunction order. The Court preliminarily enjoined the defendants from "(1) deporting any member of the plaintiff class, and (2) enforcing *Matter of N-J-B* or otherwise pretermitting applications for suspension of deportation based upon defendants' policy as expressed in said *Matter of N-J-B*." *Id.* at 87a. The Court found that the plaintiffs had "presented

substantial evidence," and had a likelihood of success on prevailing on their due process, equal protection and estoppel claims. *Id.* at 55a, 87a.

The district court found that the defendants' actions in encouraging the plaintiffs to apply for suspension, coupled with the statutory right to seek political asylum, which the class members had abandoned on the promise that they would have a right to apply for suspension, had created a property interest in their right to seek suspension of deportation. The district court did not, and was not asked to, address the merits of any individual claim to suspension of deportation. Rather, on the evidence, the district court found that "[t]here is no doubt that the Government's conduct created a substantial expectation in the community that, when coupled with the statutory right to seek asylum, created a property or liberty interest in the right to a hearing on their claims for suspension of deportation." *Id.* at 65a.[1]

The district court then made detailed factual findings concerning the irreparable harm. It discussed the cases of many of the named plaintiffs, including Alexandra Charles, a nineteen (19) year old Haitian who entered the United States in September of 1989, after witnessing the beating and murder of her parents by the Haitian military as a ten (10) year old girl. *Id.* at 76a-77a. Based upon the evidence from this and other similar cases, the district court found that the class of plaintiffs had presented "a dramatic, heartrending and powerfully persuasive case of irreparable harm." *Id.* at 74a.

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[1] The district court also found that the plaintiffs sufficiently demonstrated a likelihood of success on their equal protection claim, on the grounds that the INS' actions, in punishing those individuals who came forward and, in effect, rewarding those who remain hidden from the INS for seven years, lacked any rational basis. The Eleventh Circuit reversed this finding in vacating the district court's injunction. While petitioners believe that the Eleventh Circuit's ruling as to their equal-protection claim was incorrect, they do not seek certiorari on that issue in this petition.

The court then addressed the balance of harm and whether the injunction would serve the public interest. Noting that testimony of a member of the Florida State House of Representatives indicated that there had been panic in the Miami community due to the defendants' policies. *Id.* at 84a. The Court found that this panic caused "families to move from their homes, refuse to send children to school or the doctor, or bring their children to the hospital for medical attention .... The Director of the Human and Labor Rights Institute at Florida International University, Haydee Marin, testified that one family refused to bring their child to a hospital for medical attention, fearing deportation. The child died." *Id.* The Court also found that the administrative inconvenience that the defendants may sustain "does not outweigh the serious and substantial irreparable harm to thousands of class plaintiffs." *Id.* at 85a.

4. DEFENDANTS' MOTION TO DISSOLVE THE INJUNCTION

On November 19, 1997, the United States Congress passed, and the President signed, NACARA, which provides for the *possibility* that certain nationals of Nicaragua and Cuba who were in the United States before December 1, 1995 can become permanent residents. NACARA § 202. It does *not* apply to persons of other national origin within the certified class. Moreover, the law does not include the spouse, child or unmarried son or daughter of a Nicaraguan or Cuban eligible for adjustment of status, if those persons are not also nationals of Nicaragua or Cuba. NACARA § 202(d). NACARA further limited its relief provisions by providing a new statutory stop-time rule under IIRIRA § 309(c)(5) for persons with orders to show cause issued "before, on, or after the date of enactment of this Act," NACARA § 203(a)(1), although certain Salvadorans, Guatemalans and Eastern Europeans were exempted. NACARA § 203(a)(1).

Subsequent to the passage of NACARA, the defendants moved to dissolve the injunction, to dismiss as moot certain class members, and to obtain summary judgment as to the remaining class. Petition Appendix C (Pet. App. C) at 89a. On February 10,

1998, the district court denied the defendants' motion to dissolve the injunction, to dismiss the complaint and for summary judgment. *Id.* at 98a. The district court recognized that, although NACARA did have an impact on the issues in the case, it did not change the constitutional issues addressed by the Court in its preliminary injunction. *Id.* at 95a. The Court reiterated its determination that the retroactive enforcement of *Matter of N-J-B* and IIRIRA § 309(c)(5) would violate the Administrative Procedures Act and the Fifth Amendment Due Process Clause. The Court again noted that the scheme by which defendants were pretermitting applications for suspension of deportation was "wholly irrational and not related to any legitimate government interest." *Id.* NACARA "does nothing to change this." *Id.* The Court also rejected the defendants' claim that the injunction had become moot as a result of NACARA.

The defendants filed their notice of appeal on April 3, 1998 and sought an appeal of the district court's entry of a preliminary injunction and the subsequent denial of their request to dissolve the preliminary injunction. Petition Appendix A (Pet. App. A at 2a). It did not appeal the denial of summary judgment or their other motions.

5. THE ELEVENTH CIRCUIT'S OPINION

On July 14, 1999, the U.S. Court of Appeals for the Eleventh Circuit entered its opinion finding that the district court had jurisdiction to hear plaintiffs' claims, but nevertheless vacating the injunction. The Eleventh Circuit focused its attention first on the named plaintiffs and made detailed findings of fact about their current status, although there was no evidence in the record regarding their status, and the class had already been certified by the District Court. *Id.* at 13a-16a.

The Court then turned its attention solely to whether plaintiffs and class members were likely to succeed on their equal protection, due process and estoppel claims. Finding that the stop-time rule and the government's conduct did not violate equal protection, due process or estoppel principles, the Court of Appeals vacated the injunction, reversed the denial of the INS'

motion to dissolve the injunction and remanded the case to the district court. Although only the denial to vacate the injunction was before the Court, the Court reached the conclusion that the original injunction had been improperly issued. *Id.* at 2a. The Court of Appeals addressed none of the statutory claims that were also a basis for the district court's grant of the preliminary injunction.

Petitioners timely filed a petition for rehearing or rehearing en banc in the Eleventh Circuit. On October 6, 1999, the Court of Appeals denied that petition.

ARGUMENT

The Eleventh Circuit's opinion in this case contravened prior precedent of the Supreme Court and other Circuits by rejecting the due process claims of the forty thousand class members unjustly facing deportation. Moreover, in rejecting petitioners' estoppel claim, the Court of Appeals adopted a standard inconsistent with the previous holdings of this Court and relied upon mistaken inferences to attribute positions to this Court that Petitioners do not believe actually reflect this Court's jurisprudence. Critically, the Eleventh Circuit then applied that standard in a manner that conflicts with the jurisprudence of the other Circuits. As discussed in detail below, certiorari should be granted so that this Court may address and resolve the correct legal standards and circuit conflicts.

1. THE ELEVENTH CIRCUIT'S OPINION CONFLICTS WITH DUE PROCESS PRECEDENT OF THIS COURT AND OTHER CIRCUITS AND VIOLATES DUE PROCESS, BY CONFUSING THE PROPERTY AND LIBERTY INTEREST IN THE RIGHT TO APPLY FOR RELIEF WITH DISCRETION TO DENY RELIEF

A writ of certiorari is warranted in this case because the Eleventh Circuit's rejection of the finding on the likelihood of success on petitioners' due process claim conflicts with earlier precedent in this Court and numerous other Circuits. The

essence of the Eleventh Circuit's ruling rests on the faulty premise that, because the *award* of suspension of deportation is discretionary with the Attorney General, the petitioners would necessarily have no due process *right to seek* suspension of deportation. *Id.* at 27a-28a.

This Court has long recognized that a petitioner has a right to apply for and seek a protected liberty or property interest even if the ultimate award or denial of that interest is discretionary. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (agency failure to exercise discretionary decisionmaking power with regard to each individual violates due process); *United States v. Nixon*, 418 U.S. 683, 695-69 (1974) (due process demands an agency follow its own rules); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981); *Ponte v. Real*, 471 U.S. 491, 498-99 (1985).

The Eleventh Circuit relied on *Dumschat* but wholly misapplied it. The claimant in *Dumschat* argued that the pardon board there, through customary practices, had established a constitutional liberty interest in life inmates that required the parole board to explain its reasons for denying an application for commutation of a life sentence. *Id.* at 459. This Court rejected that contention because no such liberty interest existed. *Id.* at 460-66. In doing so, though, the Court affirmed the legal basis for distinguishing between the right to receive relief and the property or liberty interest in the right to seek relief: "We hold that the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents beyond *the right to seek* commutation." *Id.* at 467 (emphasis added).

The *Dumschat* distinction was restated in *Ponte v. Real*, 471 U.S. at 498-99:

> But to hold that the Due Process Clause confers a circumscribed right on the inmate to call witnesses at a disciplinary hearing, and then conclude that no explanation need ever be vouched for the denial of

> that right, either in the disciplinary proceeding itself or if that proceeding be later challenged in court, would change an admittedly circumscribed right into a privilege conferred in the unreviewable discretion of the disciplinary board.

In other cases, individual Justices of this Court, writing in dissent, have also identified a "right to seek" a benefit that is subject to due process protection, even where the award of the sought benefit is discretionary. *Wainwright v. Torna*, 455 U.S. 586, 589 (1982) (Marshall, J. dissenting) ("[a]s a result, respondent was deprived of his right to seek discretionary review by the State's highest court. As I suggested above, this loss is significant"); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 682 (1976) (Stevens, J., dissenting) ("[t]he fact that an individual owner (like any other petitioner or plaintiff) may not have a legal right to the [zoning] relief he seeks does not mean that he has no right to fair procedure in the consideration of the merits of his application").

Here, the payment of fees for the right to apply for suspension, the government's conduct in inducing and misleading applicants to come forward to apply and to abandon other claims now no longer available (such as for political asylum), and the actual abandonment by class members of the indisputable, uncircumscribed right to seek asylum as a result of that inducement, together and alone, justified the district court's finding in this case of a constitutionally cognizable property interest in the class member applicants for suspension. As Justice Marshall observed in concurrence in *Black v. Romano*, 471 U.S. 606, 622 n.18 (1985),

> This norm of regularity in governmental conduct informs numerous doctrines. *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (Government bound by its own regulations); *Vitek v. Jones*, 445 U.S. at 489, [100 S.Ct. at 1262] (due process interest created by

> "'objective expectation, firmly fixed in state law and official Penal Complex practice'"); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. at 467, [101 S.Ct. at 2465] (Brennan, J., concurring) (liberty interests arise from "statute, regulation, administrative practice, contractual arrangement or other mutual understanding [that establish] that particularized standards or criteria guide the State's decision makers").

The retroactive application of NACARA's new statutory stop-time rule to the class members' long-unprocessed applications for suspension worked to deny the petitioners their liberty and property interests inherent in their *right to seek* that relief. The Eleventh Circuit Court of Appeals thus erred in addressing only that portion of *Dumschat* dealing with the discretionary nature of the relief sought and by ignoring the recognized and constitutionally-protected right to seek that relief.[2]

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[2] The Eleventh Circuit panel's rejection of the distinction between the right to apply for a statutory benefit as a constitutionally protected interest and the discretion the Government has to provide that relief inexplicably contradicts settled law even in the Eleventh Circuit. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982). There, the former 5th Circuit meticulously distinguished between the right to apply for political asylum and the right to be given asylum in the discretion of the Attorney General. *Id.* at 1038-39 ("[I]n this case we conclude that Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for political asylum . . . . There is no constitutionally protected right to political asylum itself").

More recently, the distinction between the right to apply and the discretion to receive relief was considered in *Mayers v. Immigration & Naturalization Serv.*, 175 F.3d 1289 (11th Cir. 1999). The *Mayers* petitioners were denied waivers of deportation under former INA § 212(c) because the Anti-Terrorism and Effective Death Penalty Act abolished the relief. Relying on this Court's decision in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) the Eleventh Circuit panel there found, as should have been the case here, that:

> The government attempts to muddy the waters by arguing that petitioners cannot seek review of a discretionary decision by the BIA. To the

Moreover, the Eleventh Circuit's decision contradicts the established law of several other Circuits. These courts have found that the procedural safeguards of due process apply to the Executive Branch even in immigration proceedings. *Francis v. Immigration & Naturalization Serv.*, 532 F.2d 268, 272 (2d Cir. 1976), *quoting Galvan v. Press*, 347 U.S. 522 (1954); *Accardi*, 347 U.S. at 268. The courts also widely recognize a liberty interest in not being deported. *See Kofa v. Immigration & Naturalization Serv.*, 60 F.3d 1084 (4th Cir. 1995). Also, in *Singh v. Reno*, the Seventh Circuit concluded that mistakes and ineptitude by the INS, which led to lengthy administrative delays, compromised the plaintiff's ability to apply for an alternative statutory benefit, so that the INS' attempted deportation of him constituted a denial of that plaintiff's due process. 182 F.3d 504, 510 (7th Cir. 1999).

As the district court noted in this case, the INS supported, lobbied for, and fully anticipated the possibility that there would be changes to the suspension of deportation laws even as it was affirmatively encouraging the class to apply for suspension. Yet, it remained silent about the inevitable consequences if class members abandoned their right to claim political asylum or seek other relief. Suspensions, in fact, became unavailable. Pet. App. B at 72a. The Ninth Circuit has severely criticized the INS in similar circumstances when it violated due process by failing to notify aliens subject to deportation about the possibility of applying for political asylum. *Andriasian v. Immigration & Naturalization Serv.*, 180 F.3d 1033, 1041 (9th Cir. 1999); *see also Asani v. Immigration & Naturalization Serv.*, 154 F.3d

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Footnote continued from previous page

> contrary, petitioners are not seeking to review a decision to grant or deny a § 212(c) waiver, but rather are seeking to review a decision concerning the ability to apply for such a waiver.

175 F.3d at 1300 n.15.

719, 728 (7th Cir. 1998). Knowing of the substantial risk of changes to the suspension of deportation process while encouraging the petitioners to abandon asylum proceedings, the INS committed a fundamental failure of notice and effective denial of due process. Pet. App. B at 65a. However well motivated the encouragement may have been when first conceived, its repeated communications to the community were materially omissive in disclosure and operated as a fraud on the class as a whole.

Additionally, procedural due process rights exist when, as the Second Circuit recognized, the Government possesses a person's funds and denies them access to those funds without any procedure. *See Furlong v. Shalala*, 156 F.3d 384, 395-96 (2d Cir. 1998). The tens of thousands of Nicaraguan class members in this case alone spent up to $1.7 million in application fees to the Government after being induced to file for suspension of deportation. The District Court below found, correctly, that these Petitioners have a property interest stemming from the payment of those application fees in obtaining a hearing on their applications. Pet. App. B at 66a.

At bottom, the district court's opinion accords with this Court's precedent in finding that the actions of the INS had vested in the petitioners a liberty and a property interest in the existing statutory *right to seek* suspension of deportation. *See, e.g., Dumschat*, 452 U.S. at 467. The Eleventh Circuit itself acknowledged that the INS took "various actions" to "encourage aliens, particularly Nicaraguan aliens, to apply for suspension of deportation," and those aliens did come forward and "incurred substantial application and attorney's fees" in filing their applications for suspension. Pet. App. A at 25a. At the time, all class members had an undisputed statutory right to seek suspension of deportation. As a result, as noted above, tens of thousands of Nicaraguan class members alone spent up to $1.7 million on application fees, a 557% increase in the number of applications due to INS' conduct. Pet. App. B at 59a-65a. Most importantly, many non-Nicaraguan class members gave up their *statutory right* to seek asylum in the

United States, as a prerequisite to having their suspension claim heard and decided. *Id.* at 64a. There thus was no basis for the Eleventh Circuit to contravene the law of this Court and other Circuits by disturbing the finding of irreparable harm that supported the preliminary injunction below.

2. IN REJECTING PETITIONERS' ESTOPPEL CLAIM, THE ELEVENTH CIRCUIT ADOPTED A STANDARD THAT ERRONEOUSLY RELIED UPON A MIS-APPLICATION OF THIS COURT'S PREVIOUS CASE LAW, AND APPLIED THAT STANDARD IN A MANNER THAT CONFLICTS WITH THE JURISPRUDENCE OF THE FIRST, THIRD, SEVENTH AND NINTH CIRCUITS

In rejecting petitioners' claim of estoppel, the Eleventh Circuit erroneously suggested that prior case law of this Court mandated such a result. Specifically, the Eleventh Circuit ruled that a plaintiff must make a showing of "affirmative misconduct" in addition to the normal elements of estoppel in order to establish a claim of estoppel against the Government. Pet. App. A at 32a. It then, as a matter of law, applied the affirmative misconduct requirement in a manner that conflicted with the articulation and application of that doctrine as it has been used in other Circuits. This Court has never recognized such a standard, and it was inappropriate for the Eleventh Circuit to find that this Court's jurisprudence requires it. Even if this Court were to adopt that standard, the Circuits' wide variation in defining and applying the doctrine of "affirmative misconduct" in Government estoppel cases has led to conflicting decisions and warrants review in the interest of uniformity.

The Eleventh Circuit acknowledged that no case in this Court has adopted a standard that requires a plaintiff seeking to estop the Government to demonstrate any specific elements in addition to the usual estoppel elements; indeed, in several cases it has expressly stopped short from adopting an

affirmative-misconduct requirement. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990); *Immigration & Naturalization Serv. v. Miranda*, 459 U.S. 14, 19 (1982) (per curiam); *Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308, 314 (1961). It then further acknowledged that the Eleventh Circuit had never previously found it appropriate to adopt such a standard. Nonetheless, this panel of the Eleventh Circuit ruled generally that an extra element of affirmative misconduct must be shown, in addition to the ordinary elements of estoppel, and it applied that rule as a matter of law in this case. Pet. App. A at 32a.

While "affirmative misconduct" has been adopted by various Circuits as a necessary element of "government estoppel," it has not been articulated and applied in a consistent manner in the Circuits. *Barrett v. United States*, 423 U.S. 212, 215 (1976) (certiorari appropriate in case revealing "overtones of conflict" among the Circuits).

Most consistent with "the need to balance both the public interest in ensuring government can enforce the law without fearing estoppel and citizens' interests 'in some minimum standard of decency, honor, and reliability in their relations with their Government'" is the Third Circuit's articulation of affirmative misconduct in *Fredericks v. Commissioner of Internal Revenue*, 126 F.3d 433, 438 (3d Cir. 1997) (citation omitted). Under *Fredericks*, affirmative misconduct is shown where the Government has taken affirmative steps to induce a plaintiff to take potentially harmful actions, while knowingly remaining silent about that potential harm.

> The IRS' decision to lie doggo, and induce the taxpayer into thinking all was well, coupled with its additional eight-year delay in producing a document it previously represented as non-existent, compels us to conclude that the IRS was guilty of affirmative misconduct at least as of June 30, 1984.

Id. at 442. *See also id.* at 438 (discussing court's use of same approach in *Community Health Servs. of Crawford County v. Califano*, 698 F.2d 615 (3d Cir.1983), *rev'd on other grounds sub nom. Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51 (1984)).

Other Circuits have found affirmative misconduct even in cases where the Government did not take a direct action, but instead omissively failed to notify a plaintiff of a potential loss of rights or benefits. *See, e.g., Corniel-Rodriguez v. Immigration & Naturalization Serv.*, 532 F.2d 301, 306 (2d Cir. 1976). Indeed, the Ninth Circuit has ruled that delay alone can, in some circumstances, constitute affirmative misconduct. *Villena v. Immigration & Naturalization Serv.*, 622 F.2d 1352, 1360 (9th Cir. 1980). This position reflects a recognition that "some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement." *Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir. 1970).

Had the Eleventh Circuit adopted the Second, Third, or Ninth Circuit's articulation of "affirmative misconduct" in this case (which involves 40,000 persons subject to deportation), it would have had to afford great weight to the district court's findings that the INS misleadingly encouraged the class to abandon previous immigration claims and statuses in order to apply for suspension, while knowing very well that the INS had the matter under administrative review and was urging Congress, and Congress was considering, to impose new, severe retroactive restrictions upon the right to seek suspension. Pet. App. B at 69a-70a. Following the standard as described by *Fredericks* and *Califano*, and especially under the broader formulations of *Corniel-Rodriguez* and *Villena*, the Court of Appeals would have necessarily concluded that the INS had engaged in "affirmative misconduct" in this case.

The Eleventh Circuit's formulation and application of "affirmative misconduct" also conflicts with other jurisprudence of the First and Ninth Circuits. Those Circuits

have emphasized the intensely *factual* nature of the determination of affirmative misconduct. *Akbarin v. Immigration & Naturalization Serv.*, 669 F.2d 839, 845 (1st Cir. 1982) ("these are arguments which cannot be fully evaluated except after evidence has been presented from which a finding can be made as to what precise conversation, if any, took place"); *see also Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir. 1989) ("[t]here is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances"). The Eleventh Circuit ignored such factual considerations here by ruling, as a matter of law, that no possible affirmative misconduct could be evidenced, even though, as it acknowledged, the district court had made no factual findings on "affirmative misconduct." Pet. App. A at 32a-33a.

There is also a conflict between the Eleventh Circuit opinion and cases in the Seventh Circuit that have ruled that affirmative misconduct may be found even if the Government did not violate its own applicable regulations. *See Lee You Fee v. Dulles*, 236 F.2d 885, 887 (7th Cir. 1956) (*citing Lee Wing Hong v. Dulles*, 214 F.2d 753 (7th Cir. 1954); *Lee Bang Hong v. Acheson*, 110 F. Supp. 48 (D. Hawaii 1951); and *Lee Hong v. Acheson*, 110 F. Supp. 60 (N.D. Cal. 1953)). The Eleventh Circuit's opinion appears to have restrictively determined that the agency must be found to have violated its own rules or an existing statutory command in order for "affirmative misconduct" to be found.[3] Pet. App. A at 34a.

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[3] Taking yet another approach, cases in the Second and Fourth Circuits discuss affirmative misconduct in tort-law terms, indicating that estoppel generally should not be found where plaintiffs "have alleged only negligent conduct." *Azizi v. Thornburgh*, 908 F.2d 1130, 1136 (2d Cir. 1990); *see also United States v. Agubata*, 60 F.3d 1081, 1083 (4th Cir. 1995). The allegations here were not limited to mere negligence but rather claimed intentional or reckless misstatements in communications to the class to the prejudice of class members.

Thus, although the Eleventh Circuit found "uniformity" in the Circuits in adopting an "affirmative misconduct" standard, the cases in the Circuits actively reflect material and consequential differences in formulating and applying the legal standard, and the Eleventh Circuit so limited what it found could be "affirmative misconduct" that it substantially conflicts with the legal principle as formulated and applied in other Circuits. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (granting certiorari on "conflict in principle" between lower courts); *Saxbe v. Washington Post Co.* 417 U.S. 843, 846 (1974) (granting certiorari on "an apparent conflict in approach"). Guidance from this Court is appropriate and desirable to foster Circuit uniformity on the elements and standards for application of the estoppel doctrine to balance citizens' interests with the exercise of governmental conduct and its consequences.

CONCLUSION

Petitioners respectfully request that a writ of certiorari be issued to the U.S. Court of Appeals for the Eleventh Circuit, to accept for review that Court's ruling of July 14, 1999 vacating the preliminary injunction, rejecting the legal basis for petitioners' claims for violation of procedural due process and for estoppel and failing to address the nonconstitutional grounds on which the preliminary injunction was also premised.

Respectfully submitted,

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DATE: February 3, 2000

APPENDIX A
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4616

D.C. Docket No. 1:97-805-CV-King

ROBERTO TEFEL, *et al.*,
Plaintiffs-Appellees,

Versus

JANET RENO, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(JULY 14, 1999)

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.*

HULL, Circuit Judge:

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* This decision is rendered by a quorum, due to Judge Henderson's death on May 11, 1999. 28 U.S.C. § 46(d).

This class action involves the application of the recently enacted "stop-time" rule for determining eligibility for suspension of deportation. Appellants Janet Reno, Attorney General of the United States; Robert Wallis, Miami District Director of the Immigration and Naturalization Service; the Immigration and Naturalization Service; the United States Department of Justice; and the Board of Immigration Appeals (collectively the "INS") appeal two orders: (1) the district court's order entering a class-wide preliminary injunction prohibiting the enforcement of section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") as amended by the Nicaraguan and Central American Relief Act ("NACARA"), and (2) the district court's order denying the INS' motion to dissolve the preliminary injunction.

Appellees/Plaintiffs ("Plaintiffs") are members of a class of aliens within Georgia, Alabama, and Florida who were placed in deportation proceedings prior to IIRIRA. Plaintiffs challenge the application of IIRIRA § 309(c)(5), which effectively renders Plaintiffs ineligible for "suspension of deportation" under section 244 of the Immigration and Nationality Act ("INA") prior to the repeal of INA § 244 by IIRIRA. After review, we vacate the injunction, reverse the denial of the INS' motion to dissolve the injunction, and remand for further proceedings consistent with this opinion.

I. The Stop-Time Rule

Prior to IIRIRA's amendments to the INA, an alien facing deportation could apply for "suspension of deportation." In order to be eligible for suspension of deportation, an alien was required to establish four factors. INA §§ 244(a)(1) & (2), 8 U.S.C. §§ 1254(a)(1) & (2) (1991). One of these factors was that the alien had been "physically present in the United States for a continuous period of not less than" ten years after becoming deportable or seven years after

applying for suspension of deportation. *Id.*[1] Prior to IIRIRA, the time an alien spent in deportation proceedings counted toward the physical-residence requirement.

Among its many revisions to the INA, IIRIRA repealed the suspension-of- deportation provision of INA § 244 and replaced it with new INA § 240A providing for the "cancellation of removal." IIRIRA § 304(a). IIRIRA also enacted the "stop-time" provision for determining an alien's eligibility for suspension of deportation or cancellation of removal. IIRIRA § 304(a)(3) (enacting INA § 240A(a)). Under new INA § 240A(a), a permanent resident alien is eligible for cancellation of removal if, among other things, the alien "has resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. § 1229b(a) (Supp. 1998). Similarly, a nonpermanent resident alien is eligible for cancellation of removal if, among other things, the alien "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding" the application for cancellation of removal. 8 U.S.C. § 1229b(b) (Supp.1998). Under the new "stop-time" provision, however, an alien's period of residence or continuous physical presence in the United States is deemed to end once the alien has been served with a "notice to appear" for

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[1] Under INA § 244(a)(2), the Attorney General could order "suspension of deportation" if: (1) deportation was based on certain specified grounds, (2) the alien had been "physically present in the United States for a continuous period of not less than ten years" after becoming deportable, (3) in that time was a person of "good moral character", and (4) in the opinion of the Attorney General, deporting the alien would cause "exceptional and extremely unusual hardship" to the alien or to the alien's "spouse, parent, or child" who is a United States citizen. INA § 244(a)(2), 8 U.S.C. § 1254(a)(2). Importantly, however, establishing these four factors did not entitle an alien to suspension of deportation. *Gomez-Gomez v. INS*, 681 F.2d 1347, 1349 (11th Cir.1982). Instead, granting suspension of deportation remained within the Attorney General's discretion. *Id.*

removal proceedings or commits a criminal offense described in INA § 244A(d)(1), 8 U.S.C. § 1229b(d)(1) (Supp.1998).[2]

Shortly after the enactment of IIRIRA, the BIA held that the new "stop-time" rule applied to aliens who had applied for suspension of deportation prior to IIRIRA's enactment. Matter of N-J-B, Int. Dec. 3309 (BIA 1997).[3] Citing IIRIRA § 309(c)(5), which provides the "Transitional Rule with Regard to Suspension of Deportation", the BIA concluded that the stop-time provision of INA § 240A(d) applied to aliens placed in deportation proceedings before the September 30, 1996 date of IIRIRA's enactment.[4] Under the BIA's application of IIRIRA § 309(c)(5), an alien's continuous period of presence in the United States is deemed to end once deportation proceedings are commenced, even if the alien was facing deportation and had applied for

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[2] Specifically, the "stop-time" provision in INA § 244A(d)(1), 8 U.S.C. § 1229b(d)(1) (Supp.1998) provides that:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 1229(a) of this title or when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or (4) of this title, whichever is earliest.

INA § 244A(d)(1), 8 U.S.C. § 1229b(d)(1) (Supp.1998).

[3] On July 10, 1997, the Attorney General vacated the BIA's decision in Matter of N-J-B and certified the case to herself for review under 8 C.F.R. § 3.1(h)(1)(I) (providing that "[t]he Board shall refer to the Attorney General for review of its decision all cases which ... [t]he Attorney General directs the Board to refer to [her]."). Nevertheless, NACARA, enacted in December 1997, clarified that the BIA had correctly interpreted IIRIRA § 309(c)(5).

[4] IIRIRA § 309(c)(5) provides:

suspension of deportation prior to IIRIRA's enactment on September 30, 1996.

TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.-- Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence of physical presence) shall apply to notices to appear issued before, on, or after the date of enactment of this Act [i.e. September 30, 1996].

IIRIRA § 309(c)(5).

II. Plaintiffs' Class-Action Complaint

On March 28, 1997, Plaintiffs filed a class-action complaint in the United States District Court for the Southern District of Florida challenging the BIA's interpretation of the applicability of the stop-time provision. The asserted Plaintiff class consisted of aliens from various countries including Nicaragua, Haiti, Malaysia, and Iran. All of the Plaintiffs had entered the United States more than seven years earlier but were placed in deportation proceedings before they had accumulated seven years of continuous physical presence in the United States.

In their complaint, Plaintiffs included four counts of alleged statutory and constitutional violations arising from the BIA's application of IIRIRA's new stop-time provision to aliens in deportation proceedings before IIRIRA's enactment. First, Plaintiffs claimed that the BIA's interpretation of IIRIRA § 309(c)(5) was arbitrary and capricious in violation of the Administrative Procedures Act. Second, Plaintiffs claimed that as applied to aliens in deportation proceedings prior to IIRIRA, the stop-time provision violated Plaintiffs' due process and equal protection rights. Third, the Plaintiffs from Nicaragua alleged an estoppel claim asserting that the INS induced these Plaintiffs into applying for suspension of deportation and then opposed the Nicaraguan Plaintiffs' applications for suspension. Fourth, Plaintiffs claimed that the alien facing deportation in the Matter of N-J-B was

wrongfully denied representation during her deportation proceedings.[5]

III. Procedural History

A. Initial Proceedings

On April 17, 1997, Plaintiffs moved for a temporary restraining order or preliminary injunction prohibiting the BIA from deporting any members of the putative Plaintiff class. Plaintiffs also sought to enjoin the INS from applying the stop-time rule to any aliens in deportation proceedings prior to enactment of IIRIRA.

On May 20, 1997, the district court issued an order addressing a number of preliminary issues. First, the court denied the INS' motion to dismiss for lack of jurisdiction. Relying on *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991), *Jean v. Nelson*, 727 F.2d 957 (11th Cir.1984), aff'd on other grounds, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), and *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), the district court concluded that it could exercise jurisdiction over Plaintiffs' claims because these claims were not covered by the provision of former INA § 106 that granted the court of appeals exclusive jurisdiction over challenges to deportation proceedings.

In addition to denying the INS' motion to dismiss for lack of jurisdiction, the court granted "provisional class certification" of Plaintiffs' class and appointed lead counsel. The court found that the requirements for class certification under Rule 23(a) were satisfied and that Mr. Kurzban, as lead counsel, was particularly qualified to represent the class.

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[5] The disposition of Plaintiffs' fourth claim is not clear. However, the district court did not rely on this claim in entering the injunction at issue in this appeal.

Although Plaintiffs had moved for "provisional" class certification, the district court apparently granted Plaintiffs final class-action status. The court's May 20, 1997 order did not limit the certification to "provisional" certification, and the record does not indicate that the district court subsequently granted class certification. Indeed, in its subsequent order entering the preliminary injunction, the district court indicated that it had granted Plaintiffs class-action status and identified the class as follows:

> All individuals within the states of Georgia, Alabama and Florida who have been or will be denied suspension of deportation as a result of the BIA's decision to apply the transitional rule of § 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) retroactively to persons who have sought or are seeking suspension of deportation.

Finally, in its May 20, 1997 order, the district court granted Plaintiffs' motion for a temporary restraining order enjoining the INS from, inter alia, deporting any members of the Plaintiff class. The district court first determined that Plaintiffs had established a substantial likelihood of success on their claim that the BIA had misinterpreted IIRIRA § 309(c)(5)(a) in Matter of N-J-B. The district court held that IIRIRA § 309(c)(5)(a) provided that the stop-time provision in INA § 240A(d) applied only to aliens who applied for suspension of deportation and were placed in removal proceedings after IIRIRA's general effective date of April 1, 1997. The court also found a likelihood of success on Plaintiffs' constitutional claims and the estoppel claims asserted by the class members from Nicaragua.

Furthermore, the district court found that Plaintiffs had established the other factors required for preliminary injunctive relief--(a) irreparable harm from class members being deported and in many cases separated from their families, (b) balance of the harms in favor of Plaintiffs since the only harm to the INS would be having to process

Plaintiffs' applications for suspension of deportation, and (c) the public interest in avoiding the potentially wrongful deportation of a great many productive residents in local communities.

Accordingly, the district court broadly ordered that the INS was "restrained ... from deporting the Plaintiffs and class members pending further order of this Court and from enforcing Matter of N-J-B and otherwise pretermitting applications for suspension of deportation based on Matter of N-J-B or its rationale." According to the INS, the court's injunction effectively prevented the INS from using the stop-time provision as a basis for denying an alien's application for suspension of deportation if the alien had been placed in deportation proceedings prior to IIRIRA's general effective date of April 1, 1997.

B. Evidentiary Hearing and Preliminary-Injunction Order

The district court's May 20, 1997 order set a preliminary-injunction hearing for May 27, 1997. The parties presented some evidence and testimony on May 27 but were unable to present a full case. Accordingly, the district court extended the temporary restraining order and referred the case to a magistrate judge for a further evidentiary hearing. Between May 27 and June 12, 1997, the parties conducted discovery and, on several days during this period, appeared before the magistrate judge for further presentation of evidence.

After the proceedings before the magistrate judge on the preliminary- injunction motion, the magistrate judge issued a recommendation that Plaintiffs had established three of the four elements necessary for a preliminary injunction. The magistrate judge concluded that Plaintiffs had established irreparable harm, and that the balance of the harms and the public interest favored a preliminary injunction. However, the magistrate judge concluded that only the district court

could make a finding on whether the Plaintiffs had established a likelihood of success on the merits of their claims.

In an extensive order dated June 24, 1997, the district court granted Plaintiffs' motion for a preliminary injunction. First, the Court adopted the magistrate judge's finding that Plaintiffs had established that the irreparable-harm, balance-of-the-harm, and public-interest factors favored the issuance of an injunction.

The court also expounded on its conclusion that Plaintiffs had established a likelihood of success on their claims that the BIA had erroneously interpreted IIRIRA § 306(c)(5), that the stop-time rule was unconstitutional as applied to Plaintiffs, and that the INS was estopped from applying the stop-time rule. In finding a substantial likelihood of success on the merits of the due-process and the estoppel claims, the district court relied heavily on the circumstances surrounding the Nicaraguan members of the class. According to the district court, the INS induced the Nicaraguan class members into applying for suspension of deportation but then moved to pretermit these applications under the stop-time rule. The court reasoned that the INS had caused the Nicaraguan class members to incur substantial filing fees, legal fees, and an expectation that their applications for suspension would be granted, all of which gave rise to a "property or liberty interest" in a hearing on their applications for suspension. According to the district court, the Constitution prohibited the deprivation of this "property or liberty interest" without the due process of law.

In addition, the district court found that the application of the stop-time rule was "irrational" in violation of equal protection.[6] The court found that aliens who "came forward" to be placed in deportation proceedings before reaching the seven-year physical-presence requirement and who "won their

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[6] Of course, by referring to equal protection, the district court was relying on the equal-protection component of the Fifth Amendment's Due Process Clause.

suspension case[s]" were deemed ineligible for suspension. Conversely, according to the district court, aliens who "evaded the INS successfully for seven years" could become eligible for suspension. The district court concluded that "any scheme which grants relief to persons who did not come forward and denies relief to persons who did come forward is irrational and in violation of equal protection."

Likewise, the district court noted that the stop-time rule precludes an alien from accumulating time toward the physical-presence requirement as soon as the INS issues an order to show cause even if the alien's deportation proceedings do not begin for several years. Thus, the court concluded that a system that "turns on whether someone is served with a charging document" was irrational in violation of equal protection.[7]

Based on these conclusions, the district court entered an injunction that prohibited the same actions prohibited by the court's earlier restraining order. Specifically, the district court ordered that:

ORDERED, ADJUDGED and DECREED that the Defendants, Janet Reno, Attorney General of the United States, Robert Wallis, District Director, Immigration and Naturalization Service, Department of Justice, and Board of

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[7] It is important to note that although the district court couched its holding in terms of the application of the stop-time rule to aliens whose deportation proceedings began prior to IIRIRA, the court's reasoning suggests that it found the stop-time rule itself, regardless of its application to pending proceedings, to be violative of due process and equal protection. For example, the court reasoned that "any analysis which turns on whether someone is served with a charging document, even if the actual hearing does not occur for many years thereafter, is irrational and violates equal protection." Since the stop-time rule as applied in the context of cancellation of removal under the post-IIRIRA INA continues to be triggered by the service of a notice to appear, the district court's reasoning would also apply to the application of the stop-time rule to post-IIRIRA deportation proceedings.

Immigration Appeals, and their agents, employees, lawyers, and persons acting under the[ir] direction and control, be and they are hereby, preliminarily enjoined from (1) deporting any member of the Plaintiff class, and (2) enforcing Matter of N-J-B or otherwise pretermitting applications for suspension of deportation based on the defendants' policy as expressed in said Matter of N-J-B.

IV. Developments Following Entry of Preliminary Injunction

A. Enactment of NACARA

Subsequent to the entry of the preliminary injunction, Congress enacted, and the President signed the Nicaraguan and Central American Relief Act, Pub.L. 105-100, 111 Stat. 2160 (1997) ("NACARA"). On December 2, 1997, the President also signed into law technical amendments to NACARA. Public L. No. 105- 139, 111 Stat. 2644 (1997).

A number of NACARA's amendments are relevant to the instant appeal. First, NACARA § 203(a)(1) amends IIRIRA § 309(c)(5) and changes the language "notices to appear" to "orders to show cause." In addition, NACARA § 203(f) specifies that the amendments made by NACARA § 203 are effective as if originally enacted with IIRIRA. Thus, NACARA, by expressly referring to "orders to show cause," which initiated deportation proceedings prior to IIRIRA, resolves any potential linguistic ambiguity in IIRIRA § 309(a)(c) with respect to the applicability of the stop-time provision of INA § 240A(d). With this amendment, NACARA clarifies that the stop-time provision applies to aliens who were facing deportation and/or had applied for suspension of deportation before IIRIRA's enactment, because it precludes any argument that the reference to "notices to appear" suggested that Congress intended the stop-time rule to apply only to post-IIRIRA removal proceedings, which are initiated with "notices to appear."

In addition, NACARA includes several provisions that mitigate the effects of applying the stop-time rule to aliens

who were in deportation proceedings before IIRIRA. Under NACARA § 203(a), certain aliens from El Salvador, Guatemala, and Eastern Europe can apply for suspension of deportation without being subject to the stop-time provision. Moreover, NACARA allows qualified aliens from Nicaragua and Cuba to bypass the suspension-of-deportation process altogether and apply for an adjustment of their status to aliens admitted for permanent residence. NACARA §§ 202(a)(1) & (b)(1).

B. INS' Motion to Dissolve the Preliminary Injunction

On December 22, 1997, prompted by NACARA's amendments to IIRIRA, the INS moved to dissolve the district court's preliminary injunction and moved for summary judgment on all of Plaintiffs' claims. First, the INS argued that because of NACARA, Plaintiffs' claims were moot with respect to all class members from Nicaragua, Cuba, Guatemala, El Salvador, and Eastern Europe who qualified for the relief from the stop-time provision enacted by NACARA. Second, the INS argued that the district court's prior determination that the Plaintiffs had established a likelihood of establishing that the BIA had incorrectly interpreted IIRIRA § 306(c)(5) was no longer valid in light of NACARA § 203(a), which clarified that Congress intended the stop-time rule to apply to aliens in deportation proceedings before IIRIRA's enactment.

On February 10, 1988, the district court denied the INS' motion to dissolve the injunction and the INS' motion for summary judgment. Although the court agreed that Plaintiffs could no longer demonstrate a likelihood of success on their claim that the BIA had incorrectly interpreted IIRIRA § 305(c)(5), the court reaffirmed its previous conclusion that the Plaintiffs had established a likelihood of success on the merits of their constitutional claims. In addition, the court acknowledged that NACARA provided aliens from Nicaragua, Cuba, Guatemala, El Salvador, and Eastern Europe the opportunity to apply for the type of relief sought

by certain members of the Plaintiff class. However, the court held that not all of the Plaintiffs from these countries necessarily would be eligible for the relief under NACARA. The court noted that certain class members might not qualify for the exception to the stop-time provision and that other class members might not be eligible to apply for a change of status. Accordingly, the court held that it could not yet determine which claims were mooted by NACARA. Specifically, the district court noted that "[a]lthough NACARA makes it clear that certain class members will receive the relief they seek, it is not clear at this time who those class members are."

For the same reasons supporting its decision not to dissolve the preliminary injunction, the court also denied the INS' motion for summary judgment.

This appeal followed.

C. Developments During this Appeal

Since this case has been on appeal, many of the named Plaintiffs have received various relief under NACARA. Many of them have become lawful permanent residents. Other Plaintiffs are awaiting hearings, which have been scheduled, on the adjustment of their status to legal permanent residence. Still other Plaintiffs have closed, with the INS' consent, their administrative proceedings in order to file for adjustment of status under NACARA. Finally, the INS has dropped its appeals of several immigration-judge decisions granting suspension to several named Plaintiffs.

These developments, along with the developments that prompted the INS to move to dissolve the injunction, have seriously altered the legal and factual situations of all but two of the named Plaintiffs. Although these developments might not have mooted, as argued by the INS, all of the claims in this appeal, these developments are highly relevant to the reasoning used by the district court in finding that Plaintiffs had established a likelihood of success on the merits of their due process and estoppel claims. In addition, while the claims of two named

Plaintiffs remain ripe for adjudication, these developments raise serious questions regarding whether class-action status remains appropriate for this case and if so, whether the remaining Plaintiffs are proper class representatives.

The original complaint in this case included thirty-nine named individual Plaintiffs and the family members of those Plaintiffs. Of these original thirty-nine Plaintiffs and their families, thirty-five are Nicaraguan. Of those thirty-five Plaintiffs, thirty-three have received, or are eligible for, relief that places them in significantly different positions than when the district court entered the injunction in this case. Of the remaining two named Nicaraguan Plaintiffs, the immigration status of one Plaintiff is unclear and the immigration status of the other one remains pending before the Attorney General. Of the four remaining non-Nicaraguan Plaintiffs, the claim of one Plaintiff is almost certainly moot, and another may be eligible for relief from deportation other than suspension. Therefore, only two of the original thirty-nine named Plaintiffs/Plaintiff families face the same situation that prompted the district court to find a constitutional violation and enjoin the application of the stop-time rule.

More specifically, of the thirty-five named Nicaraguan Plaintiffs, twenty have become lawful permanent residents under NACARA: (1) Roberto Tefel, (2) Leonel Martinez, (3) Lorena Garcia (4) Ana Borge, (5) Ignacio Herrera, (6) Nydia Mercado, (7) Liliam Portillo, (8) Sebastian Murillo, (9) Jesus Chow, (10) Gloria Guerrero, (11) Virginia Rodriguez, (12) Leonte Martinez, (13) Zulema Balladares, (14) Franklin Siu, (15) Justina Jiron, (16) Armando Largaespada, (17) Herenia Matute, (18) Enrique Sequeira, (19) Dudley Rocha-Petterson, (20) Ernesto Torres Sandoval.[8] Similarly, two of the original Nicaraguan Plaintiffs became lawful permanent residents

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[8] In addition, German A. Reyes, who was joined as a Plaintiff after the initial complaint had been filed, has also become a permanent resident under NACARA.

prior to NACARA--(21) Carlos Morales and (22) Lucrecia Raudes.

Of the remaining thirteen named Plaintiffs, the following three are awaiting a hearing on the adjustment of their status to that of lawful permanent residents: (23) Douglas Membrano-Murillo and Damarys Contrera; (24) Juan and Ricardo Bermudez; and (25) Boanerges Pao.

Of the remaining ten named Plaintiffs, the following four have opted, with the INS' consent, to close their administrative proceedings so that they can file for adjustment of status under NACARA: (26) Manuel Mantilla, (27) Roberto Barberena, (28) Carlos Rivas, and (29) Ricardo Fonseca. Likewise, one Plaintiff, (30) Juan Gonzaga Baez, was granted suspension, the INS appealed, and Baez subsequently filed a motion to reopen so that he could apply for adjustment of status under NACARA.

In the following two cases, the aliens had been granted suspension of deportation by an immigration judge, and the INS has withdrawn its appeal of the immigration judge's decision: (32) Jaime Enriquez and (33) Freddy Quintero. Finally, one Plaintiff (34) Wilibur Baez has withdrawn as a named Plaintiff and a member of the class.

The status of one named Plaintiff, Roberto Rivera, is unclear, and one Plaintiff, Norma J. Baldizon, is awaiting the decision of the Attorney General who certified his case for her own decision.

Of the four non-Nicaraguan named Plaintiffs, the claim of one, Roberto Amaya, has been mooted and one, Alexandra Charles, may be eligible for relief under the Haitian Refugee Fairness Act, which also was signed into law while this case was on appeal.

Therefore, only two named Plaintiffs are currently facing the same legal and factual situation that they faced when the district court entered its injunction in this case. Khadijeh Aidenezhad is an alien from Iran who has lived in the United

States since 1985. The immigration judge granted Ms. Aidenezhad suspension of deportation, and the INS appealed the immigration judge's decision arguing that Ms. Aidenezad could not satisfy the continuous physical-presence requirement under the stop-time rule. It is not clear from Plaintiffs' complaint when deportation proceedings commenced against Ms. Aidenzhad or when the immigration judge granted Ms. Aidenzhad suspension. Subalecthumy Vengadasalm is an alien from Malaysia. On November 8, 1996, the immigration judge granted her suspension of deportation, and the INS appealed this decision based upon the stop-time rule.

Because there are Plaintiffs whose claims remain ripe for adjudication, we proceed to reach the merits of Plaintiffs' preliminary injunction motion granted by the district court. However, as detailed later in this opinion, these developments on appeal require the district court on remand to revisit certain aspects of the class-action status of this case.

V. Standard of Review

This Court reviews de novo issues of subject matter jurisdiction. *Triggs v. John Crump Toyota*, Inc., 154 F.3d 1284, 1287 (11th Cir.1998).

A party seeking a preliminary injunction must establish the following four factors: (1) a substantial likelihood of success on the merits; (2) a threat of irreparable injury, (3) that its own injury would outweigh the injury to the nonmovant, and (4) that the injunction would not disserve the public interest. *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir.1991) (per curiam). A mixed standard of review applies to review of the granting or denying of a preliminary injunction. *Bah v. City of Atlanta*, 103 F.3d 964, 966 (11th Cir. 1997). A district court's decision to grant a preliminary injunction and the denial of a motion to dissolve a preliminary injunction are reviewed for an abuse of discretion. *Id.*; *Collum v. Edwards*, 578 F.2d 110, 112 (5th

Cir.1978). However, questions of law supporting the preliminary injunction are reviewed de novo. *Id.*

VI. Jurisdiction

As an initial matter, we must determine whether the district court had jurisdiction over Plaintiffs' claims. The parties have briefed extensively numerous jurisdictional issues focusing particularly on whether IIRIRA's amendments to the INA's scheme for the judicial review of immigration matters altered the district court's jurisdiction over this case. We hold that this case is governed by IIRIRA's transitional rules, and therefore, the district court properly exercised jurisdiction over Plaintiffs' claims.

Under the INA before IIRIRA's amendments, the Supreme Court and this Court recognized that not all challenges to INS actions were committed exclusively to the jurisdiction of the court of appeals. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991); *Jean v. Nelson*, 727 F.2d 957 (11th Cir.1984), *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982). Because Plaintiffs' claims are within the narrow category of claims that the pre-IIRIRA INA did not exclusively commit to the jurisdiction of the court of appeals, the district court did not err in resting its jurisdiction on McNary, Jean and Smith. Likewise, because IIRIRA's transitional provisions, rather than IIRIRA's complete amendments to the INA, govern jurisdiction over Plaintiffs' claims, IIRIRA did not deprive the district court of jurisdiction.[9]

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[9] In concluding that the district court had jurisdiction over Plaintiffs' claims, this Court does not affirm or endorse the findings or reasoning of the district court in justifying its exercise of jurisdiction. Instead, we base our conclusion on the reasoning set out in this opinion.

In *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. Unit B 1982), this Court held that the exclusive judicial-review procedures under former INA § 106(a) did not apply to claims alleging "a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens." In reaching this conclusion, this Court first noted that INA § 106(a) vested exclusive jurisdiction in the court of appeals to review " 'all final orders of deportation ... made against aliens within the United States pursuant to administrative proceedings under section 1252(b) [deportation hearings]....' " *Id.* at 1032 (quoting INA § 106(a), 8 U.S.C. § 1105a(a) (1982)). We reasoned that the INA's judicial-review procedures gave "sole jurisdiction" to the court of appeals over "alleged procedural irregularities" but only "to the extent these irregularities may provide a basis for reversing an individual deportation order ...." *Id.* at 1033 (emphasis in original). Thus, this Court in Smith recognized a distinction between (1) the court of appeals' jurisdiction over an individual alien's deportation proceedings and final deportation order and (2) a district court's jurisdiction over widespread allegations of constitutional violations by immigration officials:

> The distinction we draw is one between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged.

Smith, 676 F.2d at 1033 (finding cognizable in district-court claims challenging the constitutional adequacy of the INS' procedures for administering asylum applications).

Similarly, in *Jean v. Nelson*, 727 F.2d 957, 980 (11th Cir.1984), this Court concluded that former INA § 106(b), 8 U.S.C. § 1105a(b)(1984), did not preclude district-court jurisdiction over "widespread abuses by immigration

officials." We began by noting that INA § 106(b), 8 U.S.C. § 1105a(b)(1984) provided that " 'any alien against whom a final order of exclusion has been made heretofore or hereafter ... may obtain judicial review of such order by habeas corpus proceedings and not otherwise.' " *Id.* at 980 (emphasis in original) (quoting INA § 106(b)), 8 U.S.C. § 1105a(b)(1984). Essentially following the holding in *Smith*, this Court concluded that this limitation did not preclude the district court's jurisdiction over allegations that the INS wrongfully failed to give the plaintiffs notice of asylum. *Id.*

To ensure that the exceptions from *Smith* and *Jean* did not swallow the general rule of the exclusivity of the INA's judicial-review procedures, in both cases, this Court carefully noted the limited nature of these exceptions to the exclusive-review provisions under the pre-IIRIRA INA. In *Smith*, we stated that "[o]ur holding is not to be construed as permitting a constitutional challenge in the district court based on a procedural ruling in a deportation proceeding with which an alien is dissatisfied." 676 F.2d at 1033. We further noted that such an attempt to assert district-court jurisdiction would constitute an "end-run around the administrative process" and would be inconsistent with Congress' intent in enacting the INA's judicial- review scheme. *Id.* Likewise, in *Jean*, we reiterated the limited nature of our holding. 727 F.2d at 980. "We stress that our holding is a narrow one that should not be construed to permit judicial review of run-of-the-mill interlocutory procedural rulings by an immigration judge with which an alien happens to disagree." *Id.*

After this Court decided *Smith* and *Jean*, the Supreme Court employed similar reasoning in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991). At issue in *McNary* were the judicial-review procedures governing INS decisions made regarding a special amnesty program for agricultural workers. These judicial-review provisions provided that "[t]here shall

be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection" and that "[t]here shall be judicial review of such denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title [INA § 106 (providing for judicial review in the court of appeals)]." *McNary*, 498 U.S. at 486 n. 6, 111 S.Ct. at 893 n. 6 (quoting INA §§ 210(e)(1) & (3)(A)). Relying heavily on the specific wording of these judicial-review provisions, the Court reasoned that the reference to a singular "application for adjustment" in INA § 210(e)(1) and a singular "judicial review of such denial" in INA § 210(e)(3)(A) indicated that these provisions governed jurisdiction over singular, individual amnesty applications and not "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.*; *see also Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. 43, 55, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) (holding that provisions "virtually identical" to the provisions at issue in *McNary* did not preclude district-court jurisdiction over challenges to a regulation implementing an INS legalization program).

In this appeal, Plaintiffs assert the type of class-wide challenges to INS practices that fall outside the pre-IIRIRA judicial-review scheme. Plaintiffs do not challenge the specific result in any single case and do not argue that any of the individual Plaintiffs would receive suspension of deportation if their applications received full consideration. Instead, Plaintiffs allege, and the district court found, that the application of the stop-time provision to the members of the Plaintiff class violated Plaintiffs' constitutional rights. Thus, Plaintiffs assert "a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens" that is similar to the due-process claims in *Smith* and *Jean*. Accordingly, the district court did not err in its conclusion that the pre-IIRIRA INA did not require that

Plaintiffs' claims be asserted through a petition for review in the court of appeals.[10]

The INS argues that INA § 242(g), which applies in transitional cases, precludes district-court jurisdiction over Plaintiffs' claims.[11] The INS acknowledges the Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999), but nonetheless claims that INA § 242(g) precludes jurisdiction over Plaintiffs' claims.

Despite the INS' arguments, INA § 242(g) does not apply to Plaintiffs' claims. The Supreme Court in American-Arab narrowly construed INA § 242(g) as applying only to the three discrete discretionary actions described in INA § 242(g)--the "decision or action" to (1) "commence proceedings," (2) "adjudicate cases," or (3) "execute removal

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[10] At this point, we reemphasize that Plaintiffs and the INS agree that this case is governed by IIRIRA's transitional rules. Thus, most of IIRIRA's substantial revisions to the INA's judicial-review scheme do not apply to this case and do not govern jurisdiction over Plaintiffs' claims. Although contending the permanent rule in INA § 242(g) applies, the INS concedes that nothing in IIRIRA's transitional provisions altered the district court's jurisdiction over Plaintiff's claims. Moreover, as defined by the district court, the Plaintiff class also includes aliens who were subject to final deportation orders prior to IIRIRA. The deportation proceedings of these Plaintiffs are governed by INA § 106 without the transitional rule amendments.

[11] INA § 242(g) provides that:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g) (Supp.1998).

orders." 119 S.Ct. at 943. According to the Court, Congress had good reason to focus a particular statutory provision limiting judicial review of these types of claims. *Id.* at 943-44 ("There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of 'commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders'--which represent the initiation or prosecution of various stages in the deportation process.") Plaintiffs' challenges to the application of the stop- time rule to pending applications for suspension involve constitutional challenges to legislation specifically mandating such an application of the stop-time rule. Plaintiffs' claims do not challenge the Attorney General's exercise of her discretion to commence proceedings, adjudicate cases, or execute removal orders. Thus, INA § 242(g) does not alter the jurisdiction, recognized by this Court in *Smith* and *Jean*, over class-wide allegations of constitutional violations by the INS.

Having determined that the district court properly exercised jurisdiction over Plaintiffs' claims, we now turn to whether the district court properly entered the preliminary injunction.

VII. Constitutional Claims

As discussed above, the district court found that Plaintiffs were likely to succeed on two constitutional claims. First, the district court concluded that the stop-time rule was irrational, and in violation of the equal protection component of the due process clause, because the stop-time rule rewarded aliens who evaded service of a notice to appear and penalized aliens who appeared in order to contest their deportations. Second, the district court held that the application of the stop-time rule to pending applications for suspension of deportation deprived Plaintiffs' of a "liberty or property" interest that the government created by enticing the Plaintiffs' to apply for suspension. We conclude that the district court erred in finding that Plaintiffs had established a substantial

likelihood of success on the merits of their constitutional claims.

A. Equal-Protection Claim

The rational-basis standard applies to Plaintiffs' equal-protection claim. *Rodriguez v. United States*, 169 F.3d 1342 (11th Cir.1999) (citing *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), for the proposition that "statutes which discriminate within the class of aliens comport with the Due Process Clause of the Fifth Amendment (and the equal protection principles it incorporates) so long as they satisfy rational basis scrutiny."). Under rational-basis scrutiny, a statute is "accorded a strong presumption of validity" and will be upheld if "any reasonably conceivable state of facts" could demonstrate that the statute is rationally related to a legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993); *Rodriguez*, 169 F.3d at 1350. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." Heller, 509 U.S. at 321, 113 S.Ct. 2637.

In this appeal, the stop-time rule of INA § 244A(d)(1), and IIRIRA § 309(c)(5)'s application of the stop-time rule to aliens in deportation proceedings prior to IIRIRA's enactment, are rationally related to legitimate government purposes. Congress intended the stop-time rule to eliminate the incentive to prolong deportation proceedings in order to become eligible for suspension. *See, e.g., H.R.Rep. No.* 104-879 (1997) ("Suspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued.") Certainly, removing the incentive for delay in the deportation process is a legitimate government objective. The stop-time rule clearly furthers this purpose by stopping the accrual of time toward the physical- residence requirement at the commencement of removal proceedings. Applying the

stop-time rule immediately (i.e. to aliens already in deportation proceedings) further promotes this objective by applying the rule to a larger number of aliens and removing their incentive to prolong the proceedings.

Moreover, despite the district court's reasoning, Congress rationally chose the service of a "notice to appear" to delineate the beginning of removal proceedings. Some point in the process had to be chosen, and the service of such a notice is as good a point as any because it is when the alien is first informed that he or she is facing removal from the United States. The fact that some aliens might successfully evade service of the notice to appear does not diminish the rationality of the stop-time rule. In this sense, the stop- time rule is no more irrational than Rule 4(m) of the Federal Rules of Civil Procedure, which by allowing the dismissal of a complaint when service is not perfected within 120 days, also "rewards" a person who can successfully evade service.

B. Procedural-Due-Process Claim

The procedural component of the Fifth Amendment's Due Process Clause protects against the deprivation of life, liberty, or property without the "due process of law." U.S. Const. amd. V. The necessary first step in evaluating any procedural due-process claim is determining whether a constitutionally protected interest has been implicated. *Economic Dev. Corp. v. Stierheim*, 782 F.2d 952, 954-55 (11th Cir.1986) ("In assessing a claim based on an alleged denial of procedural due process a court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such a deprivation, there can be no denial of due process."); *Smith*, 676 F.2d at 1037 ("Procedural due process is not itself an independent right, but merely the condition precedent to the deprivation of a life, liberty, or property interest. We must therefore identify a constitutionally protectable interest which triggers the safeguards of the due process clause. In short, we must determine whether the individual interest threatened by the administrative action in this case 'is one within the

contemplation of the "(life), liberty or property" language of the Fifth Amendment.' ") (citations omitted).

The district court found that the INS' actions gave rise to a protectable "liberty or property interest." It noted the various actions taken by the INS to encourage aliens, particularly Nicaraguan aliens, to apply for suspension of deportation. For example, the INS adopted a policy of not opposing motions to reopen deportation proceedings filed by Nicaraguan aliens, and the INS publicized to the Hispanic community the INS' policy of giving Nicaraguan aliens work authorization upon the filing of a motion to reopen and an application for suspension. The district court further noted that when the aliens applied for suspension, they incurred substantial application and attorneys' fees. According to the district court, the INS' actions "without question created an expectation in the Nicaraguan community" that Nicaraguan aliens would be considered for suspension of deportation and that gave rise to a "liberty or property interest in the right to a hearing on their claims for suspension of deportation."

However, expectation does not equate with liberty or property, and a constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981). In *Dumschat*, the Supreme Court held that a state inmate does not enjoy a constitutionally protected liberty interest in having his or her sentence commuted, even where the state "consistently" commuted the sentences of inmates in "most" cases. *Dumschat*, 452 U.S. at 464-65, 101 S.Ct. 2460. The Court reasoned that "a constitutional entitlement cannot 'be created--as if by estoppel--merely because a wholly and expressly discretionary state privilege has been granted generously in the past.' " *Id.* (quoting *Leis v. Flynt*, 439 U.S. 438, 444 n. 5, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979)). Instead, according to the Court, "[i]n terms of the Due Process Clause, a ... felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more

substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." *Dumschat*, 452 U.S. at 465, 101 S.Ct. 2460.

More specifically, this Court has held that the failure to receive discretionary relief in the immigration context does not deprive an alien of a constitutionally protected liberty interest. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.1986). In *Garcia-Mir*, a group of Cuban aliens claimed a liberty interest in hearings to determine whether they should be "paroled" into the United States pending the completion of their immigration proceedings. *Id.* at 1450-51. The aliens noted that the President had issued an "open arms" invitation to Cuban aliens and that Congress had created a special parole category for Cuban and Haitian aliens. *Id.* According to the aliens in *Garcia-Mir*, these actions limited the INS' discretion in making parole determinations and thereby created a constitutionally protected liberty interest. *Id.* This Court acknowledged that the Cuban aliens had been "treated more generously than is normally the case with excludable aliens." *Id.* Nevertheless, we concluded that prior generosity in awarding " 'wholly and expressly discretionary' [relief] .... does not prove the existence of a constitutional entitlement." *Id.* at 1451 (quoting *Dumschat*, 452 U.S. at 465, 101 S.Ct. 2460). Instead, we held that the proper inquiry was whether statutes or regulations limited official discretion in making parole determinations. *Id.* at 1452. Noting that the Executive's discretion in paroling aliens remained free of "'substantive limitations on official discretion'", we concluded that the aliens lacked a liberty interest in being paroled. *Garcia-Mir*, 788 F.2d at 1452 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983)); *see also Rodriguez v. Reno*, 178 F.3d 1139 (11th Cir.1999) (holding that an ineffective-assistance-of-counsel claim cannot arise from an alien's failure to receive suspension because of the Attorney General's unfettered discretion in granting or denying suspension).

Moreover, *Garcia-Mir* also illustrates that awarding and then revoking discretionary relief does not offend due process. In *Garcia-Mir*, the INS had paroled certain Cuban aliens into the United States but had subsequently revoked their parole. Rejecting the constitutional claims of these Cubans, we observed that absent rules constraining official discretion "one merely has an expectancy reinforced by a system capable of granting or withholding that liberty." 788 F.2d at 1453. Thus, this Court concluded that this group of aliens did not suffer a constitutional violation by receiving and then losing parole without any process. *Id.*

In this appeal, Plaintiffs' procedural-due-process claims are similar to the claims rejected in *Garcia-Mir*. In *Garcia-Mir*, the aliens sought discretionary parole while awaiting further proceedings, and in this case, Plaintiffs seek to apply for discretionary suspension of deportation. In both cases, the federal government had taken actions that created an expectancy that the aliens would receive the relief requested. In *Garcia-Mir*, Congress created a special parole category for Cubans, and in this appeal, the INS had initiated the various aspects of its program to encourage Nicaraguan aliens to apply for suspension.

Therefore, for the same reasons that the aliens in *Garcia-Mir* could not establish a due-process claim, Plaintiffs in this appeal have not established a likelihood of success on the merits of their due-process claim. In *Garcia-Mir*, relying on *Dumschat*, this Court determined that the Executive's complete discretion to make parole decisions was fatal to the Cuban aliens' due process claim. Similarly, the Attorney General possesses broad discretion in awarding suspension of deportation. *See, e.g. INS v. Yueh- Shaio Yang*, 519 U.S. 26, 29, 117 S.Ct. 350, 136 L.Ed.2d 288 (1996) (noting the Attorney General's "unfettered discretion" to award suspension of deportation and observing the parallels between suspension and an executive pardon); *Jay v. Boyd*, 351 U.S. 345, 354, 76 S.Ct. 919, 100 L.Ed. 1242 (1956) (noting that suspension of deportation is an "act of grace" like the

"probation or suspension of criminal sentence"). Indeed, Plaintiffs have not even attempted to argue that the Attorney General's discretion to grant or deny suspension of deportation is limited by statute or regulation. Thus, because suspension remains a purely discretionary "act of grace" and Plaintiffs have not identified any limits on the Attorney General's discretion to grant or deny applications for suspension of deportation, they do not enjoy any "liberty or property" interest attendant to their applications for suspension.

Plaintiffs attempt to distinguish the reasoning and holding in *Garcia-Mir* by arguing that their constitutional injury stems, not from being denied suspension of deportation, but from being rendered ineligible to be considered for suspension. Plaintiffs' argument draws a distinction without a constitutional difference. Where no deprivation of a liberty or property interest has occurred, no violation of procedural due process has occurred. *Smith*, 676 F.2d at 1037. No constitutionally protected interest arises from the INS' actions in granting or denying applications for suspension because the Attorney General exercises "unfettered" discretion over applications for suspension. Therefore, regardless of the ultimate disposition of an application for suspension of deportation, Plaintiffs do not possess a constitutionally protected interest in their expectancy of receiving suspension. Thus, just as Plaintiffs enjoy no "liberty or property" interest in their expectancy of receiving suspension of deportation, they enjoy no "liberty or property" interest in being eligible to be considered for suspension. Accordingly, being ineligible for suspension does not deprive Plaintiffs of a constitutionally protected interest any more than having their applications for suspension denied.

Plaintiffs also argue that the stop-time rule violates the general presumption against retroactive statutory provisions recognized in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). This argument is

without merit for two reasons. First, applying the stop-time rule to deportation proceedings pending prior to IIRIRA is not a retroactive application of a statute. *See Landgraf*, 511 U.S. at 269, 114 S.Ct. 1483 ("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law.") (citations omitted). As clarified by NACARA § 203(a)(1), the stop-time rule applies to applications for suspension that were pending in the administrative process when IIRIRA was enacted. Applying the stop-time rule to pending administrative cases does not overturn final BIA decisions affirming an immigration judge's decision to grant suspension of deportation. Thus, applying the rule to pending administrative proceedings merely "upsets expectations based in prior law" and does not "impair rights a party possessed when he [or she] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 269 & 280, 114 S.Ct. 1483 (emphasis supplied).

The second reason Plaintiffs' *Landgraf* argument fails is that *Landgraf* provides that the "first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." 511 U.S. at 280, 114 S.Ct. 1483. No one disputes that, in enacting NACARA § 203(a)(1), Congress mandated the application of the stop-time rule to aliens against whom deportation proceedings began prior to IIRIRA. Therefore, even assuming that NACARA § 203(a)(1) constituted the retroactive application of a statutory provision, there would be need for this Court to apply the judicial presumptions against the retroactive application of new statutes because Congress expressly provided for this "retroactive" application.

VIII. Estoppel Claim

A party asserting estoppel must establish the following three elements of a traditional equitable-estoppel claim: (1)

"words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things" (2) "wilfulness or negligence with regard to the acts, conduct or acquiescence" and (3) "detrimental reliance by the other party upon the state of things so indicated." *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 413 (11th Cir.1984)

However, the Supreme Court has never resolved whether, and in what manner, the doctrine of equitable estoppel can be applied against the federal government. The Court has intimated that estoppel against the government may not be available at all. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) ("In sum, Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed."). Although the Court has not adopted a per se rule prohibiting the application of estoppel against the government, the Court has clarified on numerous occasions that "the government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Serv. of Crawford*, 467 U.S. 51, 60, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984); *Richmond*, 496 U.S. at 423-24, 110 S.Ct. 2465 (declining to adopt a rule prohibiting estoppel against the government). Moreover, in its decisions declining to adopt a prohibition on estoppel against the government, the Court has consistently suggested that, if available at all, estoppel against the government depends on a showing of affirmative misconduct. *Richmond*, 496 U.S. at 421, 110 S.Ct. 2465 ("Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of 'affirmative misconduct' might give rise to estoppel against the Government."); *INS v. Miranda*, 459 U.S. 14, 19, 103 S.Ct. 281, 74 L.Ed.2d 12, (1982) (*per curiam*) ("This case does not require us to reach the question we reserved in Hibi, whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws"); *INS v. Hibi*, 414 U.S. 5, 8, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973) (*per*

curiam) ("While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana v. Kennedy*, 366 U.S. 308, 314, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961), no conduct of the sort there adverted to was involved here."); *Montana*, 366 U.S. at 314-15, 81 S.Ct. 1336 (noting that "we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials" because the conduct alleged fell "far short of misconduct" that could support estoppel).

Largely following the Supreme Court's admonition that the government cannot be estopped on the same terms as a private litigant, every other circuit has concluded that establishing estoppel by a private party against the government requires a showing of affirmative misconduct. *United States v. Javier Angueira*, 951 F.2d 12, 16 (1st Cir.1991); *Drozd v. INS*, 155 F.3d 81, 90 (2d Cir.1998); *Fredericks v. Commissioner*, 126 F.3d 433, 438 (3rd Cir.1997); *United States v. Agubata*, 60 F.3d 1081, 1083 (4th Cir.1995); *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir.1987); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir.1992); *Edgewater Hosp., Inc. v. Bowen*, 857 F.2d 1123, 1138 (7th Cir.1988), amended on other grounds, 866 F.2d 228 (7th Cir.1989); *United States v. Schoenborn*, 860 F.2d 1448, 1451 (8th Cir.1988); *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir.1989); *Penny v. Giuffrida*, 897 F.2d 1543, 1547 (10th Cir.1990); *LaRouche v. Federal Election Com'n*, 28 F.3d 137, 142 (D.C.Cir.1994); *Henry v. United States*, 870 F.2d 634, 637 (Fed.Cir.1989).

On the other hand, this Court has thus far found it unnecessary to resolve the issue of whether a showing of affirmative misconduct is required to estop the federal government. *Feldman v. Commissioner*, 20 F.3d 1128, 1134 (11th Cir.1994); *Bokum v. Commissioner*, 992 F.2d 1136, 1141 (11th Cir.1993); *Brundidge Banking Co. v. Pike County Agr. Stabilization and Conservation Comm.*, 899 F.2d 1154,

1161 n. 5 (11th Cir.1990). In each of these cases, we have concluded that because the party seeking to estop the government had not established the traditional elements of estoppel, it was unnecessary to reach the issue of whether a showing of affirmative misconduct was necessary. *Feldman*, 20 F.3d at 1134; *Bokum*, 992 F.2d at 1141; *Brundidge Banking*, 899 F.2d at 1161. The time has come to decide the issue.

In this appeal, we hold that to establish a claim for equitable estoppel against the government, the party seeking to establish estoppel must prove, in addition to the traditional elements of estoppel, some affirmative misconduct by the government. The Supreme Court repeatedly has said that the government cannot be estopped on the same terms as a private party, if the government can ever be estopped. *See, e.g., Heckler*, 467 U.S. at 60, 104 S.Ct. 2218. We agree that a rule requiring misconduct as an essential element of establishing estoppel against the government is the best way to follow the Supreme Court's command until the Court definitively determines whether and under what circumstances estoppel can be asserted against the government.

In light of this holding, the district court's finding of a substantial likelihood of success on the merits of Plaintiffs' estoppel claim must be reversed. It is not clear whether the district court believed affirmative misconduct to be an element of estoppel under these circumstances. The district court acknowledged that a showing of affirmative misconduct might be a fourth element of establishing estoppel against the government. However, the district court also noted that the INS "seemed to agree" with Plaintiffs' position that the Eleventh Circuit had declined to adopt misconduct as an element of estoppel.

Although the district court discussed Plaintiffs' theory of INS misconduct, the court's discussion suggests that it did not believe that a showing of affirmative misconduct was necessary to Plaintiffs' estoppel claim. The district court noted evidence that the INS district director knew that

Congress was considering altering the physical-residence requirement for suspension at the same time that the INS was encouraging Nicaraguan aliens to apply for suspension of deportation. The Court conceded this evidence was not a " 'smoking gun' on the Plaintiffs' estoppel argument" but found it sufficient to justify discovery on possible misconduct by the INS. Therefore, it does not seem that the district court actually made a finding that Plaintiffs were substantially likely to establish misconduct by the INS. To the extent the district court held that affirmative misconduct was not an essential element of estoppel against the government, the court applied the improper legal standard to Plaintiffs' claims.

On the other hand, if the district court concluded that affirmative misconduct was an element of Plaintiffs' estoppel claim, it erred in accepting Plaintiffs' theory of misconduct. Assuming the INS was aware of a "substantial likelihood" that Congress was going to alter the eligibility requirements for suspension, the INS' contemporaneous actions did not constitute misconduct. The mere knowledge that Congress was considering, and likely to make, changes to the requirements for suspension of deportation did not render wrongful the INS' continuation of an existing program to encourage suspension applications. Compare *Corniel-Rodriguez v. INS*, 532 F.2d 301, 302 (2d Cir.1976) (holding that the State Department's failure to warn an alien, as mandated by applicable regulations, that the alien's pending marriage would void her visa constituted misconduct) with *Mukherjee v. INS*, 793 F.2d 1006 (9th Cir.1986) (holding that a government official's incorrect advice on an immigration matter did not amount to misconduct); *Chien-Shih Wang v. Attorney General of United States*, 823 F.2d 1273 (8th Cir.1987) (holding the INS' negligence and possible bad faith in processing the alien's application for permanent residence did not amount to affirmative misconduct). Congress sometimes appears likely to do things it never actually does, and the INS was entitled to operate under existing law until it was changed. There is no indication that the INS' actions in encouraging suspension

applications violated any statute or immigration regulation. Plaintiffs offer no other theory of affirmative misconduct other than that cited by the district court. Plaintiffs' inability even to articulate another possible theory of misconduct further illiterates that they have not, based on the current record, established a likelihood of success on the merits of their estoppel claim.

IX. Class-Action Status

Because certain members of the Plaintiff class have claims that are ripe for resolution, we have reached the merits of this case and hold that the district court erred in finding that Plaintiffs had established a substantial likelihood of success on the merits of their claims. However, we note that significant issues do exist regarding the scope and propriety of the class as certified by the district court. First, the class appears to be overly broad. As defined, the class includes aliens who had applied for but been denied suspension of deportation and aliens who have never applied for suspension. Thus, the definition of the class appears to include aliens without claims that are ripe for resolution. *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 58-59, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) (holding that aliens' claims challenging the INS' regulations interpreting the "continuous physical presence" requirement for legalization under the Immigration Reform and Control Act of 1986 are not ripe until the aliens seek and are denied legalization); *Catholic Social Servs., Inc. v. INS*, 182 F.3d 1053 (9th Cir.1999).

Second, the class does not appear to satisfy the commonality requirement of Rule 23(a)(2). In finding a likelihood of success on the merits of Plaintiffs' claims, the district court's reasoning focused, almost exclusively, on INS actions that were directed specifically at the Nicaraguan Plaintiffs. Nevertheless, the district court broadly defined the class to include "[a]ll individuals within the states of Georgia, Alabama and Florida who have been or will be denied suspension of deportation" and did not distinguish between Nicaraguan and non-Nicaraguan members of the class. Also,

the class as defined by the district court includes groups of aliens whose deportation proceedings are governed by entirely different statutory provisions. While the stop-time rule applies to all aliens in deportation proceedings prior to IIRIRA, IIRIRA's transitional rules govern certain aspects of the deportation proceedings that began before April 1, 1997 if the deportation order was, or will be, entered after October 30, 1996. However, for the most part, the pre-IIRIRA INA governs the deportation proceedings that began prior to April 1, 1997 and concluded before October 30, 1996.

Moreover, the enactment of NACARA after the district court's certification clearly placed the Nicaraguan Plaintiffs in a legal position that differed significantly from the positions of the non-Nicaraguan Plaintiffs. In addition to raising further questions about whether the class satisfied the commonality requirement, the effect of NACARA on the claims asserted by the Nicaraguan Plaintiffs also raises serious questions about whether the named Plaintiffs remain adequate class representatives.

In short, on remand, we direct that, before any further proceedings are conducted relating to the merits of Plaintiffs' claims, the district court reconsider its certification of the class and reexamine whether any of the named Plaintiffs remain appropriate class representatives. Any final determinations on the merits of this case cannot be made until Plaintiffs and their respective claims are accurately identified and defined. At this juncture, our opinion holds only that Plaintiffs have not established a likelihood of success sufficient to support the broad class-wide injunction entered by the district court.

X. Conclusion

For the foregoing reasons, we conclude that the district court erred in finding that Plaintiffs had established a likelihood of success on the merits of their claims. Accordingly, we conclude that the district court erred in entering its preliminary injunction and in denying the motion

to dissolve the injunction. The district court's preliminary injunction is VACATED, and this case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B
No. 97-0805-CIV.

United States District Court,
S.D. Florida.
June 24, 1997.

Roberto TEFEL, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiff/Petitioners,

v.

Janet RENO, Attorney General of the United States; Robert Wallis, District Director; Immigration and Naturalization Service and Department of Justice, Board of Immigration Appeals,

Defendant/Respondents.

PRELIMINARY INJUNCTION
JAMES LAWRENCE KING, District Judge.

Prologue

With the drums of war beating an ever increasing cadence of death, destruction and misery across Central America during the 1980s, refugees, in the tens of thousands, fled their homelands. They came with the hope that a nation renowned throughout the civilized world for justice, fairness and respect for human rights would help them in their time of need. These people, a trickle at first, then a torrent, and finally a flood, crossed illegally into the southwestern United States. Many of these people, within a few days, weeks or months, reported to immigration authorities, explained their plight, and sought help in obtaining government-issued work permits to enable them to find employment to support themselves and their families.

Throughout the administrations of three United States presidents, the Immigration and Naturalization Service carried out the policies of those administrations and responded in a humane and compassionate manner by issuing the necessary documentation, granting work permits, and helping them integrate into our society. Along with the work permits, issued year after year by the Defendants, was a document described as an "Order to Show Cause," advising the individual refugees that although they were being permitted to remain in this country, they were subject to deportation. While the bloody civil conflicts continued in Nicaragua and El Salvador, tens of thousands of these refugees commenced new lives in America. With the blessing of successive administrations and the Defendant Immigration and Naturalization Service, they found employment, established homes, married, had children and grandchildren, started businesses, paid taxes, obeyed our laws and contributed to their community, state and new country. Although they did not know, these persons, who had lived here for many years, were about to be uprooted from their homes, separated from their families and deported.

Procedural Background[1]

On March 28, 1997, a Verified Class Action Complaint for Declaratory, Injunctive and Mandatory Relief and Writ of Habeas Corpus was filed with this Court by forty-one (41) Plaintiffs on behalf of themselves and a class representing thousands of persons similarly situated.

The class of persons in this case consists of:

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[1] The parties have each submitted excellent memoranda concerning their respective positions. The factual recital of the procedural background, as set forth in the brief of the Plaintiff class, has been adopted, in part, into this opinion as a concise statement of the intensive litigation occurring in this case over the past thirty days. In adopting this recital, the Court has carefully eliminated from Plaintiffs' summary any fact believed to be in dispute. This is done solely in the interest of enabling the Court to comply with its announcement at the conclusion of the hearing on June 12, 1997, that the Court would render this Opinion as quickly as possible.

All individuals within the states of Georgia, Alabama and Florida who have been or will be denied suspension of deportation as a result of the BIA's decision to apply the transitional rule of § 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) retroactively to persons who have sought or are seeking suspension of deportation.[2]

The action was also brought on behalf of a subclass of persons, "who are Nicaraguan nationals who paid substantial fees to reopen their cases and/or to seek suspension of deportation as a result of the defendants' inducements and promises that their applications for suspension would be considered when in fact the defendants now refuse to consider such applications."[3] This subclass alone numbers in the tens of thousands.[4]

This lawsuit seeks to challenge the Defendants'[5] policy that deprives them of their right to seek suspension of deportation in the United States. The Defendants' policy, as expressed in the decision of Defendant Board of Immigration Appeals in Matter of N-J-B, Interim Decision No. 3309, 1997 WL 107593 (BIA 1997), is to strip the Plaintiffs and class members of their right to seek suspension of deportation by applying § 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice and State, and the Judiciary Appropriations Act of 1997, Pub.L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), retroactively to bar such claims.

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[2] Complaint at ¶ 55.

[3] *Id.*

[4] Plaintiffs' Ex. 12, indicating that approximately 31,000 Nicaraguans have been in the United States for 7 years or more who are in INS docket control. An additional 22,000 Nicaraguans have submitted applications for asylum, 80% of whom are long-term applicants eligible for suspension of deportation. Plaintiffs' Exs. 12 and 13.

[5] Janet Reno, Attorney General of the United States; Robert Wallis, District Director; Immigration and Naturalization Service; Department of Justice; and the Board of Immigration Appeals.

The Plaintiffs challenge the Government's conduct in four counts. Count I of the Complaint challenged the Defendants' interpretation of § 309(c)(5) of IIRIRA as being arbitrary and capricious in violation of both the Immigration and Nationality Act and the Administrative Procedures Act. Count II challenged the Government's conduct as violative of the Immigration and Nationality Act and the Due Process Clause and Equal Protection guarantees of the Due Process Clause of the Fifth Amendment. The due process claims relate to the Government's conduct in creating, and thus denying, Plaintiffs' liberty and property interest in applying for suspension of deportation. Plaintiffs raise an equal protection claim based upon Defendants' dissimilar treatment of persons similarly situated in regard to suspension of deportation. Count III of Plaintiffs' Complaint sought estoppel against the Government by virtue of its conduct with regard to the subclass of Nicaraguan nationals seeking suspension of deportation. This count sought to challenge the conduct of the Defendants in inducing Nicaraguans to come forward and pay substantial fees to the Immigration and Naturalization Service on the promise that they would have a hearing on their claims for suspension of deportation. The Plaintiffs contend that the Defendants invited and encouraged tens of thousands of Nicaraguans to apply for suspension of deportation and to pay fees, knowing Congress was considering eliminating the right of Nicaraguans to seek suspension of deportation in the United States. Count IV of the Complaint addressed the alleged denial of due process in Matter of N-J-B itself, because the Defendant Board of Immigration Appeals ("BIA") had ex parte communication with the Defendant Immigration and Naturalization Service, invited them to submit a brief on the issue that the case was ultimately decided upon, and never contacted or gave N-J-B-'s counsel the opportunity to brief the issue that formed the basis for the Defendant BIA's decision. On April 17,

1997, after class members received letters to report for deportation.[6] Plaintiffs filed an application for a temporary restraining order and a motion for provisional class certification. The temporary restraining order sought to restrain the Defendants from enforcing their policy of pretermitting suspension of deportation applications based on an erroneous interpretation of § 309(c)(5) of IIRIRA as expressed in Matter of N-J-B, and to restrain the Defendants from deporting Plaintiffs and class members during the pendency of this action.[7] At the same time, Plaintiffs filed a motion for provisional class certification, seeking to certify the class and subclass as stated in their Complaint. On April 21, 1997, Defendants filed a memorandum of law in opposition to the application for temporary restraining order and in support of a motion to dismiss. On May 1, 1997, Defendants filed their opposition to Plaintiffs' motion for provisional class certification. An evidentiary hearing was held in this matter on May 13, 1997, and argument of counsel on all pending motions was heard on May 14, 1997. At the conclusion of counsel's argument, the Court, in open court in the presence of all parties, orally announced its decision (and the reasons therefor), granting the TRO. On May 20, 1997, this Court entered a formal written Order, embodying its oral decision, denying Defendants' motion to dismiss, certifying the class and appointing lead counsel, granting a temporary restraining order, and setting a preliminary injunction hearing for May 27, 1997. The Court addressed Plaintiffs' and Defendants' jurisdictional arguments extensively in that Order, which are incorporated herein by reference.[8]

"It is 5:30 in the evening. I suppose we have been at this since about 2:30 this afternoon, roughly, but I suppose that

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[6] Plaintiffs' Exs. 2 and 6.

[7] Motion for Temporary Restraining Order at 1.

[8] Order of May 20, 1997, denying Motion to Dismiss, Certifying Class and Appointing Lead Counsel, Granting Temporary Restraining Order, and Setting Preliminary Injunction Hearing.

everybody would just as soon find what's going to happen to not only their case, but, in some instances, or, indeed, many instances, their lives.

First, let's turn to a consideration of the motion to dismiss the complaint filed by the Defendant Janet Reno, Attorney General of the United States, *et al.*

The standard, as we all know for a motion to dismiss, under Federal Rules of Civil Procedure 12(B)6, is whether or not the complaint states a claim, when taken literally with all the averments, is true and correct and accurate.

Eleventh Circuit cases teach us a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. I am citing from an Eleventh Circuit case at 951 F.2d 1238.

The Court has concluded after careful examination of all the briefs of the parties and the evidence that's been presented and the legal argument of counsel that it does have jurisdiction in this matter to rule upon this complaint.

The motion to dismiss, therefore, will be and is denied for the following reasons:

> As counsel for the Plaintiffs have pointed out in their memorandum and brief, there is a strong presumption that actions by any federal agency are judicially reviewable in the federal courts unless expressly mandated otherwise.

The Government has pointed out, quite correctly, the explicit language of Section 242(g), and they rely heavily on Section 106, sub (a), which, on the surface, contains language that is not inconsistent with the position taken by the Government, but which, upon thorough and careful examination and scrutiny, as you all have forced me to do in this case by your well-written and thoroughly prepared briefs, memorandum and argument, impelled the conclusion that Section 242(g), under the circumstances of the issues raised in this complaint,

do not bar the Court's consideration and determination of these issues.

This case makes class-wide challenges to I.N.S. policies and does not purport to or attempt to address the merits of individual cases; thus, in this Court's view, it is not precluded by Section 106(a).

The estoppel claims raised in the complaint, the constitutional claims of estoppel are certainly beyond the scope of an immigration judge to review, Board of Immigration Appeals to review, and are, therefore, external to the deportation process envisioned by the jurisdiction of the provisions of the law pertaining to the authority of the immigration judge and the Board of Immigration Appeals.

Therefore, these claims could not be reviewed except here. They could not be reviewed by the Eleventh Circuit Court of Appeals. Certainly, any interpretation of these laws on any record developed in the United States District Court for the Southern District of Florida can be properly, and should be properly, reviewed by the Court of Appeals.

But, without a record, and none can be developed by an immigration judge under the current posture of the interpretation of the law, as articulated by the various decisions of the immigration judges and the Board of Immigration Appeals, there can be no development of a record; therefore, there can be no review.

Section 106(a) does not bar claims, as I've indicated, that the court--that they cannot consider because there is no factual record, or indeed any process by which a record can be developed; so, therefore, the Court of Appeals under its own rules and the law cannot consider those issues.

The only place the Court of Appeals can properly, carefully and thoroughly consider these issues is upon development of a record here in the United States District Court on these constitutional issues which are beyond the pale of the immigration authorities, immigration courts.

Section 242(g) certainly does not, in the opinion of this Judge at least, bar the constitutional claims of estoppel, due process and equal protection. There are constitutionally protected liberty interests when an alien is threatened by deportation that that person should have the opportunity somewhere, some place within our frame of the law, to able to contest, raise or discuss and have determined. I do not believe 242(g) does bar those constitutional claims.

The issue raised by the Government, which is a very interesting and well- reasoned and thoroughly thought out one about exhaustion of administrative remedies, bears comment.

It seems to me that all of the law that is applicable to those cases where it has been held time and again that it is futile to take an issue to a court because that court has already determined or acted upon or pronounced the law to be, or pronounced its position to be, that it does not have jurisdiction to consider an issue come into play.

That is to say, that if it is futile to take an issue to a court, then that matter may be reviewed in the appropriate process of our federal and state system and administrative system without the requirement that exhaustion be fully effected. Exhaustion is futile; it need not be required.

The arguments advanced by whether or not these actions by the immigration judges and the Board of Immigration Appeals are, indeed, actions of the Attorney General of the United States, the Honorable Janet Reno, as advanced by the Plaintiffs, are persuasive.

The arguments advanced by the Plaintiffs that they have been lulled into a change of position and an abandonment of substantial property and liberty rights, at least liberty rights, by being importuned by the Immigration and Naturalization Service to come into the process, abandon their political asylum claims, and apply for suspension hearings and pay the fees that were required for that, that argument makes a lot of sense; it is very persuasive. That certainly is something that

the immigration courts have held they have no jurisdiction to consider at this point.

So, going back to basic, basic concepts in all of our jurisprudence, one that we all learn the first year in law school: For every wrong, or let me say for every perceived wrong, there is a remedy.

From what I have heard in this case yesterday and today in a very well articulated legal argument of both sides, there simply is no remedy for the perceived wrongs of these thirty to forty thousand Nicaraguan refugees who are here in this country under this--and are at risk under this procedure, and this new law and the interpretation of this new law as advanced by the Department of Justice.

Therefore, the motion to dismiss is denied. The Court finds and holds that it does have jurisdiction to consider the application for temporary restraining order.

Before turning to that, though, perhaps along with that, it seems that the Court should address the problem of whether or not we are dealing with a class or whether or not we are dealing with two plaintiffs.

The Court finds that this record establishes on the pleadings, briefs, memoranda and argument of counsel, based upon all of the testimony that has been taken during the proceeding, and also in considering that the Plaintiffs have satisfied the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure.

The Court is satisfied that the Plaintiffs are adequate representatives of the class. It is unique and unusual perhaps in the history or time span of a judicial or legal career, that the Court would have some knowledge of the ability of the attorneys who seek to represent the class, this particular class, would have some personal knowledge based upon--a professional knowledge based upon other cases or other matters that have come before the Court.

But as counsel reminded me today, and I have forgotten the number of years, but it's been eighteen years ago that Mr. Kurzban brought a substantial class action or sought class action certification for a substantial number of Haitian refugees.

The Court, having had the experience eighteen years ago, as he reminds me or he tells me, eighteen years ago this month, of observing Mr. Kurzban and his colleagues in that case in their representation of the class, the Court is comfortable and satisfied that the class would be adequately, I could say well adequately represented, in this matter by Mr. Kurzban and his colleagues in this case.

Another element that the Court has to consider is whether or not there is a predominantly common interest that is indigenous to the class. The Court is satisfied with the showing made by the Plaintiffs in this matter of commonality and typicality in the issues, the legal issues that are raised. As I've said, they are classwide in their assertion; they are not directed individually. And they are the type of common issues that Rule 23 of the Federal Rules of Civil Procedure envision are properly the subject matter of class action treatment.

Mr. Kurzban has cited back to me my own opinions, which is somewhat rude of him, I say facetiously, but I have been here long enough I guess it happens, and it is starting to happen in cases. But he says that I said in the Haitian Refugee Center case that the matter in which the entire program is being implemented rather than challenging individual treatment determines the underlying application of class action treatment.

And I think within a framework similar to that we could deal with this problem and thus perhaps save the United States Court of Appeals for the Eleventh Circuit whatever number of thousands or tens of thousands of cases that might otherwise have to go there, provided, of course, that it could be demonstrated that the people could or would take that step and follow that process or procedure.

Therefore, the motion for class action treatment is granted.

I know you are all getting tired of listening, but I suppose we might as well go ahead and decide the only remaining at this point, or the last remaining substantial issue, and that is whether or not a temporary restraining order should issue.

The Court has concluded that it should.

The Plaintiffs in this matter have sought by their pleadings and argument to restrain the Defendants, being the Honorable Janet Reno, Attorney General of the United States, Robert Wallis, District Director of the Immigration and Naturalization Service, the Board of Immigration Appeals, and any persons acting by or under or with their authority, including any employees, staff, counsel or supervisory personnel that act within the framework of any of those administrative agencies, from enforcing the policy of pretermitting suspension of deportation applicants based upon an interpretation of Section 309(c)(5) of the Immigration Reform and Responsibility Act of 1996 as expressed in the Matter of N-J-B and the Board of Immigration Appeals 1997, and restraining the Defendants from deporting Plaintiffs and class members during the pendency of this action.

The Court finds that the Plaintiffs have established a substantial likelihood that they will prevail on the merits of their claim with respect to Section 309(c)(5) of the Immigration Reform and Responsibility Act of 1996. And that that section they have made the requisite showing that that does not apply to persons in deportation proceedings.

Secondly, the Court finds that the Plaintiffs and their class members would suffer irreparable harm if denied an opportunity to have a hearing on their claims for suspension of deportation and instead are deported to their home countries.

The Court finds on the basis of this record that the Plaintiffs and their class members would suffer extreme

hardship if they are returned to their home countries at this point in time under the status of this case as it now stands.

Three, the Court finds the harm to Plaintiffs substantially outweighs any possible harm to the Defendants from the entry of an injunction. The failure to issue an injunction would result in irreparable harm to the Plaintiffs and the class members. They would be separated in many instances from their families and forced to go to a country where they may or will suffer extreme hardship.

By contrast, the Defendants, if the Plaintiffs prevail ultimately on their claim, will only be required to maintain a process whereby they provide this class before it was promised to them in the widely disseminated application, widely disseminated notice to Nicaraguan class members to come in and seek a hearing on the suspension--to seek the suspension hearing.

Four, a temporary restraining order would serve the public interest. The Court finds on the basis of this record that the Plaintiffs and the class members herein have lived, worked and raised families in this community and elsewhere and the deportation of these persons would have a devastating impact on not only their lives but the community, the state and perhaps other parts of this nation.

Many of the class members at risk have established homes, settled families, have attended school, worked in the private sector and paid taxes to this community and this state.

The Court finds that the deportation of as many as thirty to forty thousand otherwise possibly eligible Nicaraguan suspension applicants would have an enormous impact on this community.

For all of these reasons, the Court will enter, and does enter, a temporary restraining order as sought by the Plaintiffs in their papers and the Defendants are enjoined from deporting the Plaintiffs and all class members pending further orders of this Court. "In light of the Defendants' insistence

that the Court commence a preliminary injunction hearing before expiration of the temporary restraining order, the Court issued an Order on Pending Motions on May 21, 1997, expediting discovery. The Court noted in that Order that, "due to the insistence" of the Defendants, "it is therefore necessary that discovery be expedited in order to insure that a record is fully developed, that Plaintiffs be given an opportunity to fully present their case, and that this Court has all information necessary to render a complete and informed decision on the serious issues before the Court." [9]

On May 27, 1997, the Court commenced the preliminary injunction hearing. The Defendants were unable to fully comply with the discovery within the time period, and Plaintiffs were therefore unable to present a full case on May 27, 1997.[10] On May 27, 1997, after hearing some testimony, the Court entered an Order extending the temporary restraining order through Thursday, June 12, 1997, and referred the matter to the Magistrate Judge to hear the remaining testimony in the case.[11] The extension of the temporary restraining order to June 12, 1997, was consistent with the requirements of Federal Rule of Civil Procedure 65(b).[12]

From May 27, 1997, through June 12, 1997, Plaintiffs and Defendants conducted extensive discovery in this case. Discovery continued during and through the Memorial Day weekend and each and every weekend between those time periods. As the Defendants insisted that they would treat any extension of the temporary restraining order beyond June 12, 1997, as a preliminary injunction subject to appeal, both sides made substantial efforts to complete discovery and hold evidentiary hearings. Evidence was presented

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[9] Order on Pending Motion of May 21, 1997, at 2.

[10] Order Extending Temporary Restraining Order Through Thursday, June 12, 1997; Order of Reference to Magistrate Judge of May 27, 1997.

[11] *Id.*

[12] *Id.*

before the Magistrate Judge on June 3, 4, 9, 10 and 11, 1997.[13] During this time period, Plaintiffs presented testimony from expert and lay witnesses, including a statistician,[14] the Assistant County Manager of Dade County,[15] several clergymen,[16] prominent members of the Nicaraguan business community,[17] and class members.[18] Previously plaintiffs had presented evidence from a media representative[19] and from attorneys representing Nicaraguan class members.[20] The Plaintiffs also presented substantial documentary evidence in support of their claims.[21] The Court incorporated by reference the Transcript and Exhibits offered at the temporary restraining order hearing.[22] The Defendants presented no live testimony. The documentary evidence they entered was solely directed to what they regarded as the legislative history of § 309(c)(5) of IIRIRA.[23] The Defendants also offered a small number of the named Plaintiffs' depositions as evidence.[24]

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[13] Trs. of June 3, 4, 9, 10 and 11, 1997.

[14] Testimony of Howard Gilow, Tr. of June 10, 1997, at 46.

[15] Testimony of Jose A. Ojeda, Tr. of June 11, 1997, at 106.

[16] Testimony of Monsignor Emilio Vallina and Rev. Ramon Aymerich, Tr. of June 11, 1997.

[17] Testimony of Roberto Arguello, Tr. of June 3, 1997.

[18] Testimony of Juan Fuentes, Francisco Palma, William Gaitan and others, Trs. of June 10-11, 1997.

[19] Testimony of Ana Vazquez Aldana, Tr. of May 27, 1997.

[20] Testimony of Philip Turtletaub, Douglas Lux, Cheryl Little, Mario Lovo, Tr. of May 13, 1997 and Testimony of Ernesto Varas, Tr. of May 27, 1997.

[21] Plaintiffs' Exs. 1-82.

[22] Plaintiffs' Ex. 10A.

[23] Defendants' Exs. C to H.

[24] Defendants' Exs. I to R.

THE MAGISTRATE JUDGE'S RULING AND RECOMMENDATION

After hearing the extensive evidence presented and reviewing the transcripts, Magistrate Judge Brown concluded that the Plaintiffs had established three of the four criteria necessary for a preliminary injunction, ruling:[25]

"That a preliminary injunction is necessary to prevent irreparable harm ... that the injury to the Plaintiffs would clearly outweigh any harm to the non- movant ... [and] that a preliminary injunction would serve the public interest." [26]

THE PRELIMINARY INJUNCTION EVIDENTIARY HEARING VS. TRIAL

It is easy for the distinction to become blurred between a preliminary injunction evidentiary hearing and a trial on the entitlement to permanent injunction, because of the similarities between the two proceedings in the trial court. It is imperative however, particularly in the context of the proceedings in this case that the distinction be clearly understood. The Defendants have, consistently, unequivocally, and respectfully asserted: (1) reliance upon Fed.R.Civ.P. 65(b), mandating automatic expiration of the TRO on June 12, 1997, and if extended beyond the twenty-day period of the Rule, their intention to ask the Court of Appeals to treat the stay as a preliminary injunction; and (2) resisted discovery sought by the Plaintiff class on the theory the Plaintiffs are not entitled to get full discovery since procedurally this case is at the preliminary injunction stage and is not a final permanent injunction trial. With Defendants applying these two defensive positions as trial strategy

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[25] Tr. of June 11, 1997, at 116-17. Magistrate Judge Stephen Brown made no finding as to likelihood of success on the merits because he believed that issue should be considered and determined by an Article III U.S. District Judge. He directed his opinion solely to the other criteria.

[26] Tr. of June 11, 1997, at 116-17.

(which they had every right to do under the Federal Rules of Civil Procedure), the result was an intense hard-fought struggle by the Plaintiffs, on the one hand, to obtain the evidence they needed and, by the Defendants, on the other hand, to resist discovery by all lawful and proper means. The twenty days following entry of the Temporary Restraining Order on May 14, 1997, taxed the talents and resources of all counsel far beyond normal professional limits. The parties, and their counsel, literally worked around the clock, through Memorial Day weekend and all other weekends, in their struggle to present (and to resist) a record on the issues for the Court to consider.[27]

Nothing should be inferred from the Court's foregoing recital of the intense activity of counsel that the Court is criticizing Defendants or their counsel for their respectfully stated positions and reliance upon the defenses available to them under the Federal Rules of Civil Procedure and case law. It does, however, bring into sharp focus the procedural differences between preliminary and permanent injunctions, and the scope of judicial consideration of the evidence necessary to meet the requirements for issuance of a preliminary injunction versus the magnitude of evidence to be considered at a trial on the question of issuance of a

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[27] For example, the Immigration and Naturalization Service, according to their pleadings, resisting Plaintiffs' motion to hold them in contempt for failure to give discovery in compliance with this Court's order, asserted that they had incurred approximately $18,000 in overtime payment to scores of staff employees, in a good faith attempt to comply with the Court's order. The same pleadings also reflected that they were not able to gather the information and furnish it to Plaintiffs in timely fashion. The record also reflects that the Department of Justice dispatched attorneys from Washington to assist Mr. Dexter Lee, lead counsel, in processing the six appeals from Magistrate Judge Brown's discovery orders entered during this twenty-day phase, and to assist in the preparation of the voluminous briefs and documents filed herein.

Counsel for the Plaintiff class labored under a similar, or perhaps even greater, handicap, working with more limited resources and carrying the burden of establishing the record.

permanent injunction. As stated in University of *Texas v. Camenisch*, 451 U.S. 390, 394, 101 S.Ct. 1830, 1833, 68 L.Ed.2d 175 (1981), the preliminary injunction prerequisite factor of "likelihood of success" on the merits must not be improperly equated with "success" on the merits. Blending "likelihood of success" with "success" would be particularly wrong in the case at bar, given the defense strategy of resisting discovery on the claim that the Plaintiffs are not entitled to get full discovery at this preliminary injunction stage.

LEGAL REQUIREMENTS FOR PRELIMINARY INJUNCTION RELIEF

The Court has applied the traditional four-part test for determining whether a preliminary injunction is appropriate, as articulated most recently in *Warren Publishing, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1516-17 (11th Cir.1997). To succeed, the Plaintiff class must show: (1) that there is substantial likelihood of success on the merits, (2) that the preliminary injunction is necessary to prevent irreparable injury, (3) that the injury to the Plaintiff outweighs any harm to the non-movant, and (4) the preliminary injunction would serve the public interest. The Fifth Circuit Court of Appeals in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 576-77 (5th Cir.1974) suggested guidelines to be applied by district courts considering preliminary injunction applications in the following language:

First and foremost, we reemphasize the importance of the general requirements for a preliminary injunction. It is an extraordinary remedy, not available unless the plaintiff carries his burden of persuasion as to all of the four prerequisites. The primary justification for granting a preliminary injunction is to preserve the court's ability to render a meaningful decision after a trial on the merits.

It is often loosely stated that the purpose of a preliminary injunction is to preserve the status quo.

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It must not be thought, however, that there is any particular magic in the phrase "status quo." The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, *Ross-Whitney Corp. v. Smith Kline & French Laboratories* (9th Cir.1953), 207 F.2d 190, by the issuance of a mandatory injunction, *see* 7 Moore's Federal Practice Chapter 65.04[1], or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

The parties have not made a major issue of the requirement that plaintiff demonstrate a substantial likelihood of prevailing on the merits, and the various court orders do not discuss the issue. However, it is important to consider this requirement, since, regardless of the balance of relative hardships threatened to the parties, the granting of a preliminary injunction would be inequitable if the plaintiff has no chance of success on the merits. The importance of this requirement varies with the relative balance of threatened hardships facing each of the parties.

Although a showing that plaintiff will be more severally prejudiced by a denial of the injunction than defendant would be by its grant does not remove the need to show some probability of winning on the merits, it does lower the standard that must be met. Conversely, if there is only slight evidence that plaintiff will be injured in the absence of interlocutory relief, the showing that he is likely to prevail on the merits is particularly important. *Wright & Miller, Federal*

Practice and Procedure: Civil § 2948. In this context, the district court should consider the relevance of *Gulf Oil Corp. v. Morton* (9th Cir.1973), 493 F.2d 141. Applying these principles, we turn to consideration of the four-part test.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

The Plaintiff class contends that the interpretation that § 309(c)(5) of IIRIRA[28] be applied retroactively is erroneous. The interpretation of § 309(c)(5) is embodied in the various memoranda of the Office of the Attorney General, the office of the General Counsel of INS, and other decision making and high-ranking officials of the offices of the several Defendants. The retroactivity application interpretation by the Defendants is also embodied in the seven-to-five majority opinion of the Board of Immigration Appeals in the Matter of N-J-B, Interim Decision No. 3309, 1997 WL 107593 (BIA 1997).

Conversely, the Defendants' extensive memorandum of law in opposition to the class application for preliminary injunction takes the position that Congress, not the Defendants in this litigation, legislated the retroactivity of § 309(c)(5). Additionally, the Plaintiff class has presented substantial evidence (even at this preliminary stage of the proceedings in this case) supporting their challenge to the Defendants' interpretation of IIRIRA upon due process, equal protection of law, and estoppel claims. These issues will be addressed at a subsequent portion of this opinion. Turning first to whether Plaintiffs have met the requisite burden of proof of likelihood of success on the merits on their contention of the erroneous interpretation by Defendants of IIRIRA, the issue is whether the Act was meant to be applied retroactively to cut off the seven years of physical presence needed to qualify for suspension of deportation. Any

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[28] The section states: "Transitional Rule with Regard to Suspension of Deportation. Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act."

deportation and exclusion proceedings ongoing prior to April 1, 1997, continued unchanged under IIRIRA, including ongoing suspension of deportation proceedings under § 244 of the former Immigration and Nationality Act ("INA"). IIRIRA 309(c)(1). Suspension of deportation under former § 244 required that a person have seven years of physicall presence to be eligible for this relief. Persons who were in deportation proceedings prior to April 1, 1997, such as the class members in this case, could continue to apply for suspension of deportation under former § 244, and have their cases adjudicated under the old law. Two exceptions to continuing under the old law provision were written into IIRIRA. Sections 309(c)(2) and (3) allow the Attorney General to elect to place persons who were in deportation proceedings into the new removal proceedings under certain circumstances. Additionally, a "transition" rule provided that the new § 240A(d)(1) will cut off physical presence if the respondent is "served with a notice to appear under § 239(a)." This transition provision applies "to notices to appear issued before, on, or after the date of enactment" of IIRIRA.. IIRIRA § 309(c)(5). On October 3, 1996, the INS General Counsel issued a memorandum interpreting § 309(c)(5) to apply retroactively to persons in suspension of deportation proceedings. This analysis starts with the assumption that an order to show cause is identical to a notice to appear, thus service of an order to show cause cuts off physical presence in the United States. A majority on the Board of Immigration Appeals agreed with this interpretation several months later in Matter of N-J-B, thereby building upon the original erroneous assumption. On the basis of the record as compiled before this Court during the proceedings at both temporary restraining order and preliminary injunctive hearings, careful analysis of the legal authorities cited by counsel for the respective parties, and a plain reading of the statutory language impelled the conclusion that the Defendants' original assumption and ultimate interpretation is wrong. Section 309(c)(5) incorporates the provisions of § 240A(d)(1), which reads:

"(d) Special rules relating to continuous residence or physical presence.

(1) Termination of continuous period.

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under § 239(a) or when the alien has committed an offense referred to in § 212(a)(2) that renders the alien inadmissible to the United States under § 212(a)(2) or removable from the United States under § 237(a)(2) or 237(a)(4), whichever is earliest. "Clearly, the above-quoted section does not terminate the period of continuous physical presence necessary for suspension until "when the alien is served a notice to appear under Section 239(a)." (Emphasis added.) Defendants' interpretation, firstly, overlooks the service requirement of § 240A(d)(1). Secondly, Defendants' interpretation of § 309(c)(5) changes the plain language of § 240A(d) requiring service upon an alien to simply issued after the date of enactment of the new law (September 30, 1996). The Defendants' analysis and interpretation of § 309(c)(5) relies upon an interpretation that the old "Order to Show Cause" and the new "Notice to Appear" are identical. An Order to Show Cause, particularly prior to 1992, was a very different instrument from the current Notice to Appear. The Court finds that a prior-issued Order to Show Cause can terminate a suspension applicant's physical presence only when and if the Attorney General elects to apply the new law to those persons under §§ 309(c)(2) or (3), and actually or constructively serves the applicant with a Notice to Appear under § 239. Since neither § 240A(d)(1) nor § 309 took effect until April 1, 1997, no such designation by the Attorney General of the United States has taken place. It is a basic canon of statutory interpretation that legislative purposes are expressed by the ordinary meaning of the words used. *INS v. Phinpathya*, 464 U.S. 183, 191-92, 104 S.Ct. 584, 590-91, 78 L.Ed.2d 401 (1984); *Ardestani v. INS*, 502 U.S. 129, 135-37, 112 S.Ct. 515, 519-21, 116 L.Ed.2d 496 (1991). In statutory

interpretation, it is clear that each word is given its proper and usual meaning with no word stricken as surplusage. *Kungys v. United States*, 485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988); *U.S. v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 519-20, 99 L.Ed. 615 (1955). Also, statutory sections must be construed harmoniously so as to give effect to each section. *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 489 U.S. 561, 573, 109 S.Ct. 1361, 1368-69, 103 L.Ed.2d 602 (1989). Review of the legislative history of this Act, considered in light of the analysis of the respective parties in their thoroughly written briefs in this case, brings one to the conclusion that Congress did not intend for § 309(c)(5) to be interpreted so broadly as to eliminate the right of aliens to apply for suspension of deportation where they played no role in delaying their cases. The Court's interpretation of this statute is supported by the testimony of Mr. Peter Deutsch, a member of the United States House of Representatives from District 20 in the State of Florida. Congressman Deutsch voted for IIRIRA, including § 309(c)(5), but testified that the interpretation of the Defendants was not contemplated by the legislation. Congressman Deutsch stated that "our feeling was that the interpretation by the Board was an incorrect interpretation. I'm someone who actually voted for the legislation, but I don't think really anyone contemplated that the legislation would have specifically changed the issue of suspension ... I don't think anyone who voted on this legislation contemplated the effect of the ruling ... If this was something that Congress wanted to occur we wouldn't be debating this issue now. It would have been expressed much more clear in the legislation."[29] Congressman Deutsch's sentiments were also expressed in a letter that he and other members of Congress sent to the Attorney General of the United States.[30]

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[29] Testimony of Congressman Peter Deutsch, Tr. of May 13, 1997, at 14.

[30] Plaintiffs' Ex. 1

THE DUE PROCESS CLAIM

Turning to a consideration of whether the Plaintiff class has established a likelihood of success on the merits on their due process claim of deprivation of their right to a hearing on their claim for suspension of deportation, the record establishes Plaintiffs' reliance on a myriad of statutes, regulations, administrative policy and official conduct giving rise to due process property and liberty interests. The Defendants initiated a policy in May and June of 1995 that was designed to induce and encourage Nicaraguan class members to come forward and submit applications for suspension of deportation.[31] The purpose of this special program was to induce Nicaraguans to come forward and to apply for, and pay fees for, suspension of deportation. In order to accomplish the goal of inducing and encouraging Nicaraguans to come forward, the INS specifically set out to offer them a benefit not given to other nationals. To encourage Nicaraguans to file motions to reopen and applications for suspension of deportation, they were informed that they would be given work authorization upon the filing of motions to reopen--a benefit not accorded other nationals. In her memo to the field, Joan Higgins, Assistant Commissioner for Detention and Deportation, stated that special treatment would be accorded Nicaraguans who filed motions to reopen and sought suspension of deportation. She stated: "In order to be eligible for suspension of deportation, under normal circumstances, such an alien must have a motion to reopen their immigration hearing granted by the Executive Office for Immigration Review (EOIR). However, in order to avoid lapses in employment authorization for Nicaraguans who appear eligible for suspension, the INS will accept employment authorization applications from Nicaraguans with final orders of deportation provided they submit evidence that they have filed--not been granted--a motion to reopen in conjunction with an application for

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[31] Plaintiffs' Exs. 16, 17, 18, 39, 51, 52, 58, 59, 61, 62, 63, 69, 76, and 78.

suspension of deportation...." [32] Similarly, local INS officers in the Miami District noted in drafts concerning the new suspension program that, "normally this [a motion to reopen] must be granted before INS considers the application properly filed for purposes of work authorization eligibility...." [33] Even Gerri Ratliff, Counsel to the Deputy Attorney General, in a draft memo to various persons in the Department of Justice, acknowledged the special inducement that the INS provided to Nicaraguans to make them come forward to pay fees and apply for suspension of deportation. She stated that: "Without this new policy, INS would not grant the motion to reopen, which could take several months ..." [34] The policy was published in the Federal Register, thus providing notice to the world as to the special policy for Nicaraguans.[35] The notice stated that "specifically, the INS will treat the filing of a motion to reopen deportation proceedings accompanied by an application for suspension of deportation as a sufficient basis upon which such a person may apply for work authorization." The matter was also widely publicized in the press.[36] The INS' policy was also distributed in the mass media via television programs that cover 99% of Hispanic households in Dade and Broward Counties.[37]

In addition, INS established a policy of not opposing any motion to reopen that was filed by Nicaraguans. David Martin, General Counsel of the Immigration and Naturalization Service, sent a letter to Paul Schmidt, Chairman of the Board of Immigration Appeals, that stated that "the Service has reconsidered its position regarding motions to reopen filed by Nicaraguans since the phase-out of

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[32] Plaintiffs' Ex. 16.

[33] Plaintiffs' Ex. 77.

[34] Plaintiffs' Ex. 69.

[35] Plaintiffs' Ex. 18.

[36] Plaintiffs' Exs. 39 and 46.

[37] Plaintiffs' Ex. 37; Testimony of Ana Vazquez-Aldana at 129.

the Nicaraguan Review Program.... The Service has determined that it will not oppose a motion to reopen to apply for suspension of deportation if the alien appears to be statutorily eligible for that relief.... Upon the filing of a motion to reopen the Service may grant work authorization upon finding that the physical presence requirement for suspension of deportation has been met."[38] During the same time period, memos were sent out to trial attorneys around the United States "not to oppose MTR's (motions to reopen) filed by Nicaraguans who are eligible for suspension." [39]

This policy was also reinforced by the Defendant BIA because it developed a far lower standard for reopening Nicaraguan cases than those of other nationals. Matter of L-O-G, Interim Decision No. 3281 (BIA 1996) ("Given the fact the Service has taken no action to deport these respondents and indeed, indicated its acquiescence in the filing of suspension of deportation applications by similarly situated individuals, we find no reason to deny reopening as a matter of discretion".) When this program during the first year resulted in only approximately 2,500[40] Nicaraguans reopening their cases, the INS increased its efforts. INS not only republished the notice in the Federal Register, extending the program to June 12, 1997,[41] but it initiated an extensive media promotion. The Defendants also circulated the notice to Interpreter Releases, a journal widely read by immigration lawyers throughout the United States. [42] They developed fact sheets to submit to the press and the public. [43] They developed

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[38] Plaintiffs' Ex. 15.

[39] Plaintiffs' Ex. 54.

[40] Plaintiffs' Ex. 69 at 1-2.

[41] Plaintiffs' Ex. 25.

[42] Plaintiffs' Ex. 57.

[43] Plaintiffs' Exs. 22 and 23.

a question-and-answer sheet for "media guidance."[44] The Commissioner herself sent letters to community leaders such as Haydee Marin, stating that the Defendants had decided to extend the program through June 12, 1997, because "this will allow advocates for and within the Nicaraguan community in the United States additional time to publicize the opportunity to file for suspension of deportation and to secure legal assistance for eligible Nicaraguans."[45]

At the local INS office, special procedures were established to notify Nicaraguans that they should apply for suspension of deportation.[46] Even Nicaraguans who were taken into detention would be released and allowed to apply for suspension of deportation if they had seven years at that time.[47] People were also given specific instructions by INS at Miami on how and under what circumstances to file motions to reopen.[48]

While the Government was liberally granting these motions to reopen if Nicaraguan nationals paid the fees, they were also approving their suspension of deportation applications in South Florida at a rate significantly higher than normal for INS. By February, 1996, approval rates were as high as 87% in Miami, and 81% nationwide.[49] These extraordinarily high rates would unquestionably induce people to come forward when compared with the 60% approval rate nationwide for non-Nicaraguans.[50]

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[44] Plaintiffs' Ex. 24.

[45] Plaintiffs' Ex. 10.

[46] Plaintiffs' Ex. 18A.

[47] *Id.*

[48] Testimony of Philip Turtle Taub, Tr. of May 13, 1997, at 38.

[49] Plaintiffs' Exs. 19 and 63 at page 3.

[50] Plaintiffs' Ex. 72 at 4 [Memo to Attorney General of 2/27/97 at page 3 of the document].

The Government's policy and conduct without question created an expectation in the Nicaraguan community, even absent the statutory right to seek suspension of deportation. Nicaraguans in substantial numbers paid the $280 fee to reopen their cases and apply for suspension and employment authorization. Nicaraguans came forward in substantial numbers with the expectation that they "just had to file, do the paperwork, file what was necessary, the case would be open, I would have my day in court." [51] The number of Nicaraguan suspension applications during this period increased dramatically. Between June 13, 1995, and February 21, 1997, (the date that Matter of N-J-B was issued), there was a 557% increase in the number of Nicaraguan suspension applications that were filed.[52] Howard Gitlow, a statistician who analyzed the number of suspension applications for Nicaraguans and non-Nicaraguan class members, presented evidence at the preliminary injunction hearing, demonstrating the dramatic increase in the applications. In addition to the 557% increase in applications that were filed during the suspension of deportation program for Nicaraguans, there was a 650% decrease in the applications when comparing the time period June 13, 1995, to February 21, 1997, and post-February 21, 1997. Mr. Gitlow compared non-Nicaraguans for the same period of pre- and post-June 13, 1995, and found that Nicaraguan applications increased 239% more than applications of non-Nicaraguans. In analyzing motions to reopen, he found that during the pre-June 13, 1995, and post-June 13, 1995, periods, there was a 315% increase in applications, and a 2,000% decrease subsequent to February 21, 1997, when Matter of N-J-B was publicly announced. Mr. Gitlow testified that there was a precipitous rise in applications during the June 13, 1995, to February 21, 1997,

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[51] Testimony of Philip Turtletaub, Tr. of May 13, 1997, at 44-45.

[52] Expert testimony of Howard Gitlow, Tr. of June 10, 1997, at 54.

period, and a precipitous decline in applications subsequent to that period.[53]

As the result of the program to induce Nicaraguans to come forward, the Nicaraguans paid substantial fees to the Immigration and Naturalization Service. Haydee Marin estimated that the fees solely for the applications for suspension of deportation and motions to reopen were over $1.5 million. Mr. Gitlow did a cluster sample of fees paid during the period June 13, 1995, to February 21, 1997. He determined that the total amount paid in Miami alone was a minimum of $1.161 million. He stated that if there were other files that could be reviewed, the amounts could go as high as $1.4 or $1.7 million. The Plaintiffs also made a financial commitment to their cases, not only in the fees they paid to the INS, but also in the substantial attorneys' fees and other resources that were necessary to reopen their cases.[54]

Numerous witnesses testified that they came forward and applied for suspension. Ms. Olga Lazo said that she applied based on the news reports because "we were almost 100% sure that we really had suspension." [55] As a result of coming forward, the Nicaraguan class members gave up substantial benefits. Many of them gave up their right to continue to seek political asylum in the United States.[56] At the time of these hearings the INS estimated that there were approximately 15,200 long-term asylum applications pending, of which 80%

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[53] *Id.*

[54] Testimony of Philip Turtletaub, Tr. of May 13, 1997, at 59.

[55] Testimony of Olga Lazo, Tr. of June 3, 1997, at 91.

[56] Testimony of William Gaitan, Tr. of June 10, 1997, at 65; Testimony of Olga Lazo, Tr. of June 3, 1997, at 91; Testimony of Douglas Lux, Tr. of May 13, 1997, at 119-21; Testimony of Dudley Rocha Petterson, Tr. of May 27, 1997 at 153-54; Testimony of Khadijeh Aidinezhad, Tr. of June 3, 1997, at 48.

would be facially eligible for suspension because they were here for seven years or more.[57]

There is no doubt that the Government's conduct created a substantial expectation in the community that, when coupled with the statutory right to seek asylum, created a property or liberty interest in the right to a hearing on their claims for suspension of deportation. On February 21, 1997, as a result of the change in policy by the Defendants, Plaintiffs were deprived of the right to have a hearing on their claims for suspension of deportation. As a result of the change of policy, class members had their applications for suspension of deportation "pretermitted." [58] Class members were denied suspension of deportation.[59] The BIA began dismissing appeals because Matter of N-J-B pretermitted their cases. [60] Class members whose cases are now pending will be subject to pretermission.[61] One lawyer testified that over 250 clients of his were no longer eligible for suspension of deportation in light of the Defendants' change of policy.[62]

The Defendants' policy is to continue to initiate deportation proceedings.[63] Ms. Little testified that in a meeting with Robert Bach, INS Executive Associate Commissioner for Policy and Planning, she was informed that INS would execute deportation orders. This is reflected in the

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[57] Plaintiffs' Ex. 81.

[58] Testimony of Philip Turtletaub and Douglas Lux, Tr. of May 13, 1997, at 30 and 106.

[59] Plaintiffs' Ex. 41 is a small sample of the number of class members denied suspension of deportation.

[60] Plaintiffs' Exs. 33 and 42 are a small sampling of the class members who have BIA decisions dismissing their cases.

[61] Plaintiffs' Ex. 43 is a sample of those cases. See also Testimony of Maria Esperanza Vargas Chavaria, Tr. of May 27, 1997; Testimony of William Gaitan, Tr. of June 3, 1997; Testimony of Dudley Rocha Pettersen, Tr. of May 27, 1997.

[62] Testimony of Philip Turtletaub, Tr. of May 13, 1997 at 42.

[63] Testimony of Cheryl Little, Tr. of May 13, 1997, at 90.

Government's issuance of "bag and baggage" letters, which are notices to appear to be physically removed from the United States. These letters have been given to class members.[64]

An interpretation of a statute that has the effect of barring completely access to the courts irrespective of the merits of a person's claim has been held to violate due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). A retroactive application of § 309(c)(5) violates due process by barring persons completely from even applying for suspension of deportation. Deportable aliens, such as Plaintiffs and class members, have long been recognized as having full due process rights. *Bridges v. Wixon*, 326 U.S. 135, 152, 65 S.Ct. 1443, 1451-52, 89 L.Ed. 2103 (1945); *Ibrahim v. INS*, 821 F.2d 1547, 1550 (11th Cir.1987). In paying fees to the government for an application, the Plaintiffs and class members have a property interest in obtaining a hearing on their applications. This record establishes that persons who came forward, who were placed in deportation proceedings prior to seven years of presence (but had their hearing after seven years), and who then won their suspension case are now being denied the right to seek suspension of deportation, even if they have now been in the United States for more than seven years. Conversely, someone who evaded INS successfully for seven years is eligible for suspension of deportation. The latter person is eligible even if he has been here less time than a person who has been served with an Order to Show Cause but where INS took no action to deport the person until many years after the seven years were reached. Any scheme which grants relief to

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[64] Plaintiffs' Exs. 2 and 6. Congressman Peter Deutsch also testified that the INS had not stopped deportations, and that he had talked with persons who had received bag and baggage letters. Testimony of Congressman Peter Deutsch, Tr. of May 13, 1997, at 17.

persons who did not come forward and denies relief to persons who did come forward is irrational and in violation of equal protection. Similarly, any analysis which turns on whether someone is served with a charging document, even if the actual hearing does not occur for many years thereafter, is irrational and violates equal protection. As the evidence at the hearings before this Court demonstrated, the Defendants' policy produced conflicting results. Douglas Lux, a lawyer representing hundreds of Nicaraguan clients, testified that he has clients who have been granted suspension who have been in the United States for seven years, and others who have been denied suspension who have been here for 14 years or more, because of Matter of N-J-B. Similarly, Plaintiffs who had their application for suspension pretermitted under N-J-B have been here 12 years,[65] 11 years,[66] and 10 years.[67] There was also testimony of families who came during the same year where, in one case, the husband's application was pretermitted because he was issued an order to show cause before seven years,[68] and where, in another case, the wife and children were pretermitted because they were served with orders to show cause within seven years while the husband was not.[69] A witness testified concerning the applications of a husband, wife and children heard together before an Immigration Judge, in which the husband and children were granted suspension of deportation, but the wife's application was pretermitted because she was served with an order to show cause prior to the seven years.[70] Distinctions such as

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[65] Testimony of Ms. Aidinezhad, Tr. of June 3, 1997, at 45; Ms. Largaespada, Tr. of June 11, 1997, at 4; Mr. Rivas, Defs.' Exhibit P at 8; and Ms. Portillo, Defs.' Exhibit O at 7.

[66] Testimony of Roberto Tefel Defs.' Exhibit R at 5; Testimony of Palma, Tr. of June 10, 1997, at 30.

[67] Testimony of Dudley Rocha Pettersen, Tr. of May 27, 1997, at 144.

[68] Testimony of Dudley Rocha Pettersen, Tr. of May 27, 1997, at 154.

[69] Testimony of William Gaitan, Tr. of June 10, 1997, at 66.

[70] Testimony of Mirna Largaespada, Tr. of June 11, 1997, at 10.

these are wholly irrational and not related to any legitimate governmental interest. This is particularly so in light of an overriding congressional interest under the Immigration and Nationality Act in unifying families. *See generally* INA § 201(a)(1) and (b)(2)(A)(i).

Equal protection is also offended when distinctions are drawn between Nicaraguan and other potential applicants for suspension. The Defendants induced only Nicaraguans to come forward and apply for suspension thereby targeting them for unlawful treatment. By establishing a special program that targeted Nicaraguans and that ultimately resulted in their being ordered deported, the Defendants have violated due process. *Yeung v. INS*, 76 F.3d 337 (11th Cir.1995); *Garberding v. INS*, 30 F.3d 1187 (9th Cir.1994); *Francis v. INS*, 532 F.2d 268 (2nd Cir.1976).

THE ESTOPPEL CLAIM

The traditional elements of estoppel are: (1) a misrepresentation by another party, (2) which has been reasonably relied upon, (3) to the claimant's detriment. *Pinnacle Port Community Assn., Inc. v. Orenstein*, 872 F.2d 1536, 1542 (11th Cir.1989); *United States v. Asmar*, 827 F.2d 907, 912 (3d Cir.1987). The Defendants suggest in their brief at page 27, that a fourth element of estoppel must be established and proven by a party asserting this theory against the government, namely affirmative misconduct. The Plaintiff class takes the position in its brief (page 45) that the Eleventh Circuit has declined to adopt this fourth element of affirmative misconduct as the burden of proof for a party asserting estoppel against the government. The Defendants seemed to agree with this analysis at page 27 of their brief, citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1202 (11th Cir.1989); *Brundidge Banking Co. v. Pike County Agrig. Stabiliz. and Conserv.*, 899 F.2d 1154, 1161 n. 5 (11th Cir.1990); *Eagle v. Sullivan*, 877 F.2d 908, 912 n. 7 (11th Cir.1989). Regardless of whether the fourth element of estoppel has been recognized by the Eleventh Circuit, and

therefore must be applied in this case, or not, Plaintiffs contend that all the elements of estoppel have been met in this case (Brief, p. 45). Plaintiffs' contention, and the evidence they were able to present at this very preliminary stage of this case, relies upon the fact that the Defendants, while inducing and encouraging Nicaraguans to apply for the special Review Program in June 1995, and subsequently extending the policy until June 1996, did so with knowledge that Congress was considering drastic changes in the suspension laws which would eliminate the right of Nicaraguans to obtain suspension. This special Nicaraguan Review Program notified Nicaraguan nationals that if they had seven or more years of physical presence in the United States, they might be eligible for relief from deportation by applying for suspension of deportation.[71]

Mr. Anthony C. Moscato, Director of the Executive Office for Immigration Review, testified that he was aware as early as June of 1995 that Congress was considering proposals that "would drastically reduce or eliminate the right of people to seek suspension of deportation."[72] Mr. Moscato had cleared his testimony with supervisors in the Department of Justice, including the Office of Legislative Affairs.[73] His testimony was consistent with his earlier testimony before Congress, where he expressly recognized that "suspension of deportation is drastically curtailed," under Congress' proposal in H.R.1915.[74] The Defendants knew that Congress was making these proposals as early as June of 1995, at the time that they announced the suspension of deportation program

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[71] The Nicaraguan Review Program was to originally end June 12, 1995. The Defendant INS instituted an additional one-year period for allowing Nicaraguans who had final orders of deportation prior to June 13, 1995, the opportunity to apply. At the end of this one-year period, the INS extended the transition period for one more year until June 12, 1997.

[72] Testimony of Anthony Moscato at Plaintiffs' Exhibit 49 at 6.

[73] *Id.* at 7.

[74] Plaintiffs' Ex. 34.

and publicized it in the Nicaraguan community. The Defendants continued to publicize and induce Nicaraguans to come forward to apply for relief which Defendants could reasonably have known would not be available. The Defendants wrote to Congressman Gephardt on March 13, 1996, supporting this treatment of § 309(c)(5),[75] while continuing to promote and induce Nicaraguans to come forward for the next year. Plaintiffs argue that Defendants were willing to "go along" with the proposal to cut off the right of the same Nicaraguans who they were inviting to come forward to make such applications.

The Defendants were well aware by June 1995 that there was a substantial likelihood that suspension of deportation in one manner or another would be "drastically curtailed." They did not disclose this to the Nicaraguans and, in fact, continued during all of 1995 and 1996 to encourage and induce Nicaraguans to pay the fees and to come forward seeking suspension of deportation. This action by INS affirmatively induced Nicaraguans to apply for due process suspension hearings, knowing that, in all probability, they would never have an opportunity to obtain the relief they were induced to request. INS had already interpreted the new law concerning the time required for physical presence to be of retroactive application at least three months prior to BIA's announced opinion in N-J-B. A memorandum dated November 29, 1996, (unsigned) from Robert A. Wallis, INS' acting district director in Miami, to Thomas C. Leupp, INS' acting Eastern regional director stated:

The recent changes in Immigration Law have dramatically limited the opportunity for adjustment of status which has adversely affected a large number of the Nicaraguan cases in the category 3 docket in Miami.

Moreover, guidance issued by General Counsel now dictates that motions to reopen for the purpose of filing for

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[75] Defendants' Mem. at 16; Defendants' Ex. B4 at 38.

suspension of deportation are to be opposed where, as in the case under review, the order to show cause was issued prior to the alien's accrual of the required physical presence requirement.

(Pls.' Ex. 52 at 2) (emphasis added). The Court has not found anything in the record, including in acting District Director Wallis' deposition, that elucidates the point that INS apparently knew before the BIA ruled in N-J-B that the new, more restrictive physical presence requirement would apply retroactively, thus rendering ineligible for suspension tens of thousands of previously eligible class members. Plaintiffs assert that Defendants' acts and conduct go beyond mere misrepresentation and reach the level of affirmative misconduct, citing *Akbarin v. INS*, 669 F.2d 839, 842 (1st Cir.1982). The Court does not, at this time, consider the District Director's statement to be a "smoking gun" on the Plaintiffs' estoppel argument. But the exhibit does raise questions about INS policy at the time they were encouraging Plaintiffs to seek suspension. It supports Plaintiffs' contention that they deserve a full opportunity to take discovery in the case and that they should not be shackled with the expedited discovery necessitated by Defendants' insistence that the preliminary injunction hearing proceed immediately. District Director Wallis' statement is an example of the type of evidence that Plaintiffs should be permitted to develop in reasonable discovery prior to trial. With reference to the other prongs of the estoppel claim, it appears from the evidence presented thus far that Plaintiff class members relied on the representations made by the Defendants. An unresolved issue, looming large as an issue to be developed in discovery and at trial, is the serious question of whether the representations that were unquestionably made by Defendants, were intentional misrepresentations. The Plaintiffs paid substantial fees,[76] and

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[76] Testimony of Howard Gitlow, Tr. of June 10, 1997, at 52; Testimony of Haydee Marin, Tr. of May 13, 1997, at 180.

in many cases withdrew their applications for political asylum.[77] The Plaintiffs filed these applications in extraordinarily large numbers. During the relevant time period there was a 557% increase in the number of Nicaraguan suspension applications. This represented a 239% increase over applications of non-Nicaraguan class members.[78]

There is also no question that Plaintiffs and class members relied on the Defendants' representations to their detriment. They paid substantial fees to the Government and to attorneys to represent them in a suspension hearing that they never received or which has now been taken away from them by Defendants' policy.[79]

The detriment to Plaintiffs and class members also occurred in a far more profound way than simply by the payment of funds they could ill afford. After learning of the program, their hopes and expectations of remaining in the United States were raised and then dashed by the Defendants' change in policy.[80]

The Defendants, although given a full opportunity to present live testimony through witnesses at both the hearing on temporary restraining order and preliminary injunction, declined to do so. As set forth in the earlier portion of this opinion, the Defendants relied instead upon the introduction of documentary exhibits primarily dealing with the subject matter of the legislative history of IIRIRA. The testimony of the Plaintiff class is largely, if not entirely, uncontradicted. The Plaintiffs have chosen to rely instead upon their interpretation of § 309(c)(5) pertaining to retroactivity of the new Act, as well as their oft-stated assertion that the United

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[77] Testimony of William Gaitan and others

[78] Testimony of Howard Gitlow, Tr. of June 10, 1997, at 54.

[79] Testimony of Philip Turtletaub, Tr. of May 13, 1997, at 59; Testimony of Douglas Lux, Tr. of May 13, 1997, at 119-21.

[80] *Id.*

States District Court has no jurisdiction in this matter. The Defendants rely upon legal analysis and oral argument of their theories of law, as contrasted with the presentation of live witnesses, to establish their position. With respect to the estoppel claim of the Plaintiffs, and whether or not the Plaintiffs have a likelihood of success on the merits on this issue, defense counsel raises the following theories: (1) the Plaintiff class relied upon their own attorneys and not the widespread announcement of the Nicaraguan Review Program for information regarding motions to reopen their applications, (2) the Plaintiffs would have been subject to deportation anyway, so there is no detrimental reliance upon the Program so widely publicized by INS, (3) the Plaintiffs could have gone to immigration judges concerning their estoppel claim (citing Matter of Hernandez [Puente], 20 I. & N. Decision 335, 338, 1991 WL 353520 (BIA 1991)), and (4) Plaintiffs' estoppel claims must be made in the Circuit Court of Appeals by petition for review from administrative judge rulings (not in the U.S. District Court). The Plaintiff class has correctly pointed out that, with respect to the source of information, the testimony of Leonel Martinez (Defs.' Ex. L at 49) and the testimony of Ignatio Herrera (Defs.' Ex. K at 34) established that some of the Plaintiffs obtained information directly from the Defendants about the Program. Further, the record establishes that the Defendants used announcements through the news media, met with community leaders and urged them to announce the Program, and published in the Federal Register notification of the Program. The Defendants exercised great effort to advise all interested parties with the widest possible dissemination of information what they were inviting the Plaintiffs to do respecting applications for suspension of deportation. Regarding Defendants' theory that the Plaintiffs were subject to deportation anyway, and therefore suffered no detrimental reliance, the record is clear that many of the Plaintiffs were not subject to deportation. A number of other Plaintiffs withdrew their claims for political asylum and submitted applications for suspension, according to the testimony of

William Gaitan (Tr. of June 10, 1997, at 65), and the testimony of Dudley Rocha Pettersen (Tr. of May 27, 1997, at 149). With respect to the BIA case of Hernandez [Puente], the decision states: "The Board itself and the Immigration Judges are without authority to apply the doctrine of equitable estoppel against the Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation." Mario Lovo testified, (Tr. of May 13, 1997, at 161), that an equitable estoppel claim could not be raised before the Immigration Court in any form whatsoever. Lastly, with respect to the legal theory of Defendants' counsel that these claims should be presented in the first instance to the United States Court of Appeals, Plaintiffs rely upon *Abedi-Tajrishi v. INS*, 752 F.2d 441, 443 (9th Cir.1985), wherein this argument was rejected. There, the Ninth Circuit found that an allegation of affirmative misconduct by INS raised factual issues that had not been given an adequate hearing in the Immigration Court, and held that the proper forum to seek review was the United States District Court, where a hearing could be conducted, enabling the creation of a factual record. Clearly, the Court of Appeals, by its own rules, is not the proper forum for the creation of a reviewable record.

II. IRREPARABLE HARM

Seldom, if ever, has such a dramatic, heartrending and powerfully persuasive case of irreparable harm to literally tens of thousands of human beings been presented to this federal court.

A. THE UNCONTRADICTED TESTIMONY

Maria Esperanza Vargas de Chavarria, a Nicaraguan wife and mother, entered the United States on November 11, 1988, with her husband and infant daughter. They applied for political asylum, and after three appearances before an Immigration Judge, the application for asylum was denied in 1994. Mrs. Chavarria filed an appeal from the decision. Her appeal has yet to be ruled upon. In 1995, Mrs. Chavarria, her

husband and daughter applied for suspension of deportation. Mrs. Chavarria and her husband had a hearing on November 12, 1997, but their daughter has had no hearing. Mrs. Chavarria's request for suspension of deportation was denied, and she appealed this decision to the Board of Immigration. Mrs. Chavarria's daughter, who is now seventeen years old, suffers from San Filippo's Down syndrome, and as a result of this illness, her bones "turn and twist and crumble up". (Tr. of June 11, 1997, at 132 11. 9-12.) Mrs. Chavarria stated that her daughter will eventually stop speaking, understanding, moving and walking. In addition, the child suffers from scoliosis of the back. She required extensive surgery because her back was "so twisted that it was affecting her lungs and pressing on them." (Tr. of June 11, 1997, at 132 11. 1-18.) Mrs. Chavarria's daughter's wounds from her back surgery became infected, affecting her bones as she remained hospitalized for two months. Mrs. Chavarria testified that deportation of her daughter would be a "death sentence," because the necessary treatment is not available in Nicaragua. (Tr. of June 11, 1997, at 133-34.) Dudley Rocha Petterson, a 27-year-old Nicaraguan husband and father of three, entered the United States on August 28, 1987, by way of Brownsville, Texas, at the age of 17. Mr. Petterson and various members of his family belonged to the Nicaraguan military and because of their background were victims of harassment, arrest and death. Mr. Petterson was arrested on two separate occasions before his escape from Nicaragua. (Tr. of June 11, 1997, at 146 11. 5-6.)A few months after his arrival in the United States, Mr. Petterson applied for political asylum. When his application for asylum was rejected in 1992, he immediately appealed the decision of the Immigration Judge. After hearing media reports about possible suspension of deportation for Nicaraguans, he contacted Legal Aid. Mr. Petterson, upon the advice of his assigned attorney from Legal Aid, withdrew his pending application for political asylum and applied with his wife for suspension of deportation in consolidated applications. Mr. Petterson's application was denied and his wife's application was granted because "she

never received an Order to Show Cause." (Tr. of June 11, 1997, at 154 11. 24-25.) Mr. Petterson stated his Immigration Judge advised him to "wait awhile, because there would certainly be changes in the law because the law was extremely unjust." (Tr. of June 11, 1997, at 155 11. 24-25, and at 156 1. 1.)The Pettersons have three daughters who were all born in Miami, Florida and are U.S. citizens. Two of his young daughters (ages 7 and 6) suffer from Argininemia, a rare form of cerebral palsy. Only 40 cases of Argininemia have been documented in the world. Mr. Petterson explained that one of his daughters was born blind and the other daughter "just looked off into space ... doesn't walk, ... didn't talk, ... didn't move." (Tr. of June 11, 1997, at 150 11. 22-25.) Mr. Petterson was informed by researchers at Jackson Memorial Hospital that the necessary treatment for Argininemia is not available anywhere in the world, except in the United States and Canada. (Id. at 151 1. 11.) The daughters' diets are closely monitored by a nutritionist and Jackson Hospital because the children require special formulas available only at Jackson. Mr. Petterson's oldest daughter is fed through a tube. In addition, Mr. Petterson's daughters receive treatment from an orthopedic physician because neither of them can walk. The daughters must consult a neurologist. Mr. Petterson's daughters have improved considerably from the extensive treatment they have received from their doctors in the United States and also from the education and care they received at the United Cerebral Palsy School. Mr. Petterson is unable to appeal his case because he does not have adequate finances. His daughters demand the complete attention of Mrs. Petterson, and Mr. Petterson is the sole financial provider. If Mr. Petterson is deported, Mrs. Petterson and her daughters will be homeless because neither Mrs. Petterson nor Mr. Petterson will be able to make the mortgage payments. Alexandra Charles, a 19-year-old Haitian, entered the United States in September 1989 with a tourist visa after witnessing the beating and murder of her parents by the Haitian military as a 10-year-old child. Ms. Charles applied for political asylum but her request was

denied because the Immigration Judge "didn't think it was enough evidence." (Tr. of May 13, 1997, at 133 l. 22). Ms. Charles appealed the decision to the Board of Immigration Appeals, but a decision has yet to be rendered. She applied for suspension of deportation and her request was granted. Immigration Services is now appealing this order. Based on the N-J-B interpretation of the new law and according to INS, Ms. Charles has only lived in the United States for six and a half years, falling short of the seven-year requirement for suspension of deportation. Although Ms. Charles has actually resided in the United States for eight years, INS takes the position that she is ineligible for suspension of deportation. Ms. Charles attends Miami-Dade Community College and works as a reservationist at Club Limousine Service to pay for her tuition. She has a 3.3 GPA and hopes to attend the University of Florida upon her graduation from Miami-Dade. Ms. Charles' family lives in the United States. Ms. Charles is a full-time student and cannot afford an appeal before the Eleventh Circuit Court of Appeals. She faces deportation to Haiti, where she witnessed the vicious murder of her parents and where she no longer has any ties. Not only will her education goals be shattered, her life may be at stake. Lauren Correa is a 27-year-old housewife who entered the United States in 1988 and applied for asylum in Texas upon her arrival. Ms. Correa's application was denied, and she appeared before an Immigration Judge in 1991. The Judge's decision allowed Ms. Correa one year for a voluntary departure. After the year elapsed, Ms. Correa applied for multiple extensions of her voluntary departure. Ms. Correa received no response from INS although she continued to receive work permits until 1994. In 1996, Ms. Correa moved to reopen her case, seeking a suspension of deportation. Ms. Correa is scheduled to appear in July of this year regarding her application. Ms. Correa is the mother of two American children, ages 7 and 3. Her 7-year- old, Marcos, is autistic and has been twice hospitalized for asthma. Marcos attends a school for exceptional children where he receives speech therapy three to four times weekly. If Marcos remains in a

special school and continues his current therapy, he is likely to become a normally functioning adult. If he does not attend a special school and receive regular therapy, his progress will stop and he will never mature beyond his current mental capacity. Ms. Correa's 3-year-old child, David, was born with a "tiny ball in his eye" that has been surgically excised. (Tr. of June 3, 1997, at 109.) A biopsy revealed nothing wrong; however David's neurologist suggests that David continue to be closely monitored through periodic M.R.I.s. David has demonstrated early signs of autism and is being monitored for this condition. Both of Ms. Correa's American children require frequent medical monitoring and regular therapy to continue their progress. Lorena Mesa, a 32-year-old Nicaraguan, entered the United States in 1989 by crossing through the Texas border. Ms. Mesa immediately applied for political asylum in Miami upon her arrival. Although Ms. Mesa was never given an appointment for an interview with INS, she continued to receive work permits. Ms. Mesa has yet to receive a final decision from the Immigration Judge regarding her application. Ms. Mesa is married to a Nicaraguan man whose initial asylum case was denied and is currently being appealed. Ms. Mesa has been in the United States for more than seven years, and during that time has given birth to a daughter. Ms. Mesa's daughter is currently 3 years old and has been diagnosed with Down's syndrome, recurring heart murmurs, a kidney abnormality, and a cleft palate. She has had surgery to treat her heart condition and is likely to require a second surgical procedure to fully correct her heart condition. She also will likely need surgery to correct her cleft palate. She receives physical therapy, occupational therapy and language therapy almost monthly. If Ms. Mesa is deported, her daughter will also have to leave the country to be with her parents and will likely die without the technology and health care the United States has available to aid her treatment. Khadijeh Aidinezhad is an Iranian who entered the United States in July 1985, on a visitor visa. Ms. Aidinezhad's visa was extended, and eventually she received a student visa to complete her

master's degree in the United States. After losing her student visa, Ms. Aidinezhad contacted an attorney who advised her that she might be eligible for political asylum. At her asylum hearing, Ms. Aidinezhad was denied asylum, and she appealed. The "Court of Appeals" returned Ms. Aidinezhad's case to the Immigration Judge, stating that there was no evidence to support the denial of Ms. Aidinezhad's application and that the case should be reopened. Ms. Aidinezhad was then informed by the "Court of Appeals" that she was eligible for suspension of deportation. Before the Immigration Judge reviewed Ms. Aidenezhad's application for asylum, Ms. Aidenezhad withdrew her application for asylum and applied for and was granted suspension of deportation. The attorney for INS agreed that Ms. Aidinezhad would suffer extreme hardship if deported to Iran and that Ms. Aidinezhad was a person of good moral character. INS appealed Ms. Aidinezhad's grant of suspension, contending that the law had changed and was no longer applicable to her case. This appeal is still pending. Ms. Aidinezhad is the sole care-giver and financial provider to her 79-year- old mother, a U.S. resident, who suffers from severe osteoporosis and thyroid problems. Ms. Aidinezhad's mother requires constant medical attention and care and relies entirely on Ms. Aidinezhad to provide her with basic necessities and medicine. Although currently employed as a stenographer ultrasound specialist, Ms. Aidinezhad hoped to continue her education in the United States and complete her master's degree, an option not available to women in Iran. If Ms. Aidinezhad is deported, she will lose the chance to continue her education, and more importantly, her elderly and dependent mother will lose the only financial support and care giver she has. Olga Isabel Martos Rodriguez del Cazo arrived in the United States in 1988 with her husband and two children, then ages 7 and 1. Since arriving, Ms. Cazo has had an American child, now age 7. Ms. Cazo has three brothers who were granted asylum, and eventually became U.S. citizens. Ms. Cazo filed an application for asylum upon her arrival, and was denied the following month. Ms. Cazo

reapplied in February 1989. While awaiting her hearing with the judge, Ms. Cazo learned of the seven-year rule. After contacting her attorney, and believing her chances of success in a suspension of deportation hearing to be favorable, Ms. Cazo withdrew her application for asylum. At Ms. Cazo's suspension hearing, she was denied suspension of deportation and is currently appealing. Carla Patricia Centeno, an 18-year-old mother, came to the United States from Nicaragua in August 1989 with her 6-month-old son, aunt, and three cousins. They fled their native land because of political persecution and crossed into the United States by way of Texas. Four days after Ms. Centeno's arrival in the United States, she presented herself to the INS in Texas and applied for asylum. Due to financial restraints Ms. Centeno could not travel from Miami to Texas to appear at her asylum hearing, and her case was closed in her absence. (Tr. of June 3, 1997, at 119 1. 14.) Ms. Centeno filed a second request for asylum with the INS in Miami, but she has yet to be notified of the status of her asylum request. Finally, Ms. Centeno applied for suspension of deportation in September 1996 after being in the United States for seven years. Ms. Centeno testified that she learned about suspension of deportation relief from the print and television news media. (Tr. of June 3, 1997, at 120, 1 12.) She believed that she would receive a suspension of deportation if she fulfilled the requirements of the law. However, her belief was groundless because her request for suspension was denied. Ms. Centeno has appealed this decision to the Immigration Board of Appeals and is still awaiting a decision. Four months after Ms. Centeno arrived in the United States her son was diagnosed with cerebral palsy. Her son, who is now 8 years old, is confined to a wheelchair because he is unable to walk. His disease requires that he receive medical supervision by a neurologist, physical therapist, and an occupational therapist. Ms. Centeno's son also applied for a suspension of deportation and his request was denied. This denial ensures that the hardships of this family will grow because the special classes and medical treatment that her son needs are not available in Nicaragua.

(Tr. of June 3, 1997, at 124, 1. 11.) Although Ms. Centeno has appealed this decision, her attorney has advised her that her appeal will be denied and that she will have to appeal to a higher court. (Tr. of June 3, 1997, at 123, 11. 23-24.) The appeal to a higher court is out of Ms. Centeno's reach because she will not be able to afford counsel to represent her. (Tr. of June 3, 1997, at 124, 11 4-5.) Juan Raphael Baez, an 18-year-old Nicaraguan, entered the United States with his oldest brothers and his younger sister by crossing the Mexican border in September 1986 at the age of 7. Mr. Baez and his family applied for and were granted suspension of deportation on October 28, 1996. INS has appealed this decision. Mr. Baez will graduate in June 1997 from Miami Coral Park Senior High, where he actively participated in student government and various extracurricular activities. Mr. Baez, if allowed to stay in the United States, plans to enroll at a local community college and major in video production and advertising. Mr. Baez aspires to attend the University of Miami and to enroll in the cinematography program, one of best programs in the country. Mr. Baez explains that he has spent his formative years in the United States, and it has become his society and his culture. (Tr. of May 13, 1997, at 199 1. 20.) Mr. Baez does not have the funds to pursue an appeal in the Court of Appeals. If deported, Mr. Baez will have to drop out of school and leave his home, his culture and his country. Yade Lacayo, a 20-year-old Nicaraguan, entered the United States with a tourist visa on February 5, 1987, at the age of 10. Mr. Lacayo has lived in the United States for the last ten years and has received a final order of deportation. His parents and siblings received residency, and one brother became a citizen of the United States. He has applied for suspension of deportation but his request was denied based on the Defendants' N-J-B interpretation. Mr. Lacayo, for immigration purposes, has been in the United States for only three years (not ten years). He received a final order of deportation on April 21, 1997.Mr. Lacayo has attended school in the United States since the fifth grade and is presently a junior at Florida International University, where he maintains

a 3.0 GPA. He expects to graduate in December 1998, in Mathematics Education. He works as a substitute teacher at Miami Senior High School to pay for his education, plans to acquire a master's degree in leadership and aspires to be a school principal. In addition to his curricular activities and his employment, he is an active member of the community. He belongs to the Holy Ghost Church, "attend[s] Camillus House, organize[s] food drives, walk-a-thons." (Tr. of May 13, 1997, at 145 11. 4-6.) Mr. Lacayo is unable to appeal the immigration decision because he does not have the necessary funds. If deported Mr. Lacayo will lose his family, his home for the last ten years, and his community. Lucille Barrow Hodgson, an 86-year-old Nicaraguan widow, mother of six and grandmother of twelve, entered the United States on April 29, 1984, with a tourist visa. Mrs. Hodgson has resided in the United States for the last thirteen years. In 1987, Mrs. Hodgson applied for political asylum but was denied. She applied for suspension of deportation with the help of Florida Immigrant Advocacy Center, but that request was denied. Mrs. Hodgson appealed this decision, but her request for an appeal to the Board of Immigration was denied. Mrs. Hodgson, who lives with her oldest daughter, suffers from high blood pressure and bronchitis. Mrs. Hodgson's children, most of whom live in the United States, presently take care of her. If Mrs. Hodgson is deported, she will have no one to take care of her, and she be not be able to care for herself financially. Mrs. Hodgson has no other means of support but her children who reside in the United States. Frank Lopez, a 16-year-old, came from Nicaragua with his mother and brother in 1988. Mr. Lopez's mother filed applications for political asylum for herself and her two sons but later withdrew them so that she could join their case with her husband's deportation proceedings. (Tr. of June 3, 1997 at 131 11. 14-15.) Mr. Lopez testified that he is very emotionally distressed over the possibility that his father's application of suspension of deportation will be denied. Mr. Lopez's father, who had not been in the United States seven years when he filed his application, will not be eligible for

suspension under the terms of § 309(c)(5) of the Illegal Immigration Reform and Responsibility Act of 1996. (Tr. of June 3, 1997, at 132 11. 17, 19 and 22.) Mr. Lopez also testified that his father is the main financial support of his family, and if his father is forced to return to Nicaragua, his mother cannot support the family alone. (Tr. of June 3, 1997, at 132, 11. 23 and at 133, 11. 6-7.) He testified that his 17-year-old brother, who is classified as learning disabled because he cannot read or write, will not be able to get any help for his learning disability in Nicaragua. (Tr. of June 3, 1997, at 133, 11. 17, 20, 22 and 23.) It is Mr. Lopez's belief that his brother will suffer extraordinarily from his father's leaving because his father gives his brother needed extra support and attention. (Tr. of June 3, 1997, at 134 11. 7-9.) Mr. Lopez testified that he has no future in Nicaragua, (Tr. of June 3, 1997, at 134 1. 16), because he has not been back to Nicaragua since he was 6 years old. He testified he would not return to Nicaragua with his father if his father were deported. (Tr. of June 3, 1997, at 134, 11. 14, 20-21 and at 35, 1. 5.) As Mr. Lopez so poignantly put it: "I have everything here. I have a future here." (Tr. of June 3, 1997, at 134, 1. 16.) The preceding twelve summaries of individual cases of persons who testified in this preliminary injunctive hearing are a cross-section of the Plaintiff class. There are thousands of other cases that could be developed at the ultimate trial in this case. This testimony, as indicated above, is unrebutted. The Defendants have elected to forgo the presentation of any evidence disputing any of the testimony set forth herein. They have, as observed in the preceding opinion, elected to rely upon the policies established by INS for retroactivity of the calculus by which presence in the United States is computed and upon lack of jurisdiction in the United States District Court. As Defendants have so correctly stated at page 44 of their brief "A showing of irreparable injury is the sine qua non of injunctive relief." *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of America v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir.1990). Plaintiffs agree, citing *Canal Authority v. Callaway*, 489 F.2d 567, 572

(5th Cir.1974). The Defendants have respectfully, but forcefully, made it clear that they will continue to deport class members. This was confirmed by the testimony of Congressman Peter Deutsch that he had received requests for assistance from many people who had received their "bag and baggage" letters. (Tr. of May 13, 1997, at 17.) According to Plaintiffs' Exhibits 33, 41 and 42, and the testimony of Mr. Lux, Ms. Little, Mr. Turtletaub, Mr. Lovo, Mr. Lacayo, (Tr. of May 13, 1997, at 145.) A substantial number of Plaintiffs have had their suspension hearings denied, appeals dismissed or motions to reopen denied based on the Defendants' policies and interpretation of IIRIRA and N-J-B. Mr. Turtletaub testified, (May 13, 1997, at 58) that he had a client who did not want to send his child to school because of the situation. Fear and panic have swept through the community, causing families to move from their homes, refuse to send children to school or the doctor, or bring their children to the hospital for medical attention. (Trs. of June 11, 1997, at 72 and 81; June 3, 1997, at 37-38; May 13, 1997, 171 and 183.) The Director of the Human and Labor Rights Institute at Florida International University, Haydee Marin, testified that one family refused to bring their child to a hospital for medical attention, fearing deportation. The child died. "The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *United States v. State of Alabama*, 791 F.2d 1450, 1459 (11th Cir.1986). The Court finds that the Plaintiff class has established that class members will sustain substantial irreparable harm if a preliminary injunction is not issued. Accordingly, the Court orders a preliminary injunction to preserve the Court's jurisdiction until orderly and meaningful discovery can be completed and a trial held.

III. BALANCING HARM OF PLAINTIFFS TO HARM OF DEFENDANTS

The Court considers first the Defendants' position, as set forth at pages 55-57 of their memorandum, as to harm flowing to the federal government if a preliminary injunction

is entered. The Defendants assert that "... the granting of a preliminary injunction would interfere with the federal government's ability to control the flow of immigration and ... the ability of the Executive Office of Immigration Review to effectively process the cases within its jurisdiction." (Defs.' Mem. at 56.)The Plaintiff class argues that this is an imagined harm because Plaintiffs do not seek "... an injunction of deportation proceedings or even a particular outcome in any deportation case. Defendants are free to move forward with deportation proceedings as quickly as they wish. If Defendants claim that giving someone a suspension of deportation hearing interferes with their processing of cases, then they ignore their statutory responsibility to permit hearings where they are provided by law. Plaintiffs seek deportation hearings under proper standards." (Pls.' Mem. at 57.) Upon balance, the administrative inconvenience the Defendants may sustain does not outweigh the serous and substantial irreparable harm to thousands of class plaintiffs as set forth in the preceding portions of this opinion.

IV. DOES ENTRY OF A PRELIMINARY INJUNCTION SERVE THE PUBLIC INTEREST?

The uncontradicted testimony of Assistant County Manager Jose Antonio Ojeda that there would be approximately a $1 billion loss in revenue to Dade County if Nicaraguan class members were deported, (Tr. of June 11, 1997, at 108), would seem to resolve this issue. He went on to testify that the deportation of class members would affect the County's efforts in regard to new welfare legislation that requires welfare recipients to find work. A major source of employment for such people is in small businesses such as those operated in the Nicaraguan community in Dade County. The departure of such businesses would affect those efforts. State Representative Jorge Rodriguez Chomat, attorney and state representative for District 114 of the State of Florida, testified that the Nicaraguan community of Sweetwater is becoming increasingly concerned and worried about the effect deportation will have on their community. The community,

as it understands the law, fears that families will be separated and that the entire community will be uprooted. Rep. Chomat explained that parents were fearful they would be deported to Nicaragua and forced to abandon their minor children who are U.S. citizens. In addition, Rep. Chomat testified about the detrimental economic effect deportation would have on the community of Sweetwater. He stated that the "city would have to stop existing" if a substantial number of the Nicaraguan community was deported. According to Rep. Chomat, the community is experiencing feelings of panic. An application of the law as presently interpreted in N-J-B would negatively affect Dade County, and particularly, the City of Sweetwater, economically as well as emotionally. Robert Arguello, a U.S. citizen born in Managua, Nicaragua, is a prominent Nicaraguan in the Miami community. He has testified before Congress on two occasions regarding the needs of the Nicaraguan community, and he is a member of the United States Hispanic Task Force. Mr. Arguello testified that the recent ruling in N-J-B has had tremendous effect, both socially and economically, on Nicaraguans living in Miami. He described the situations of numerous Nicaraguans who have been unable to get work permits and have lost their jobs as a consequence. Also affected are American children of Nicaraguan parents. The children are afraid to go to school, fearing that their parents will be deported in their absence. He estimated that as a result of the government's changed policy, 100,000 Nicaraguans will lose their jobs and will no longer be able to afford the basic necessities of food, rent and utilities. (Tr. of June 3, 1997, at 27.) Mario Lovo, a Nicaraguan attorney educated in the United States, testified that suspension of deportation is a form of relief that no longer exists for his Nicaraguan clients, since the ruling of N-J-B. (Tr. of May 13, 1997, at 154.) Under the current process, if a Nicaraguan does not have a suspension of deportation hearing pending, he cannot renew his work authorization. Since 1995, if a Nicaraguan filed a motion to reopen and a suspension of deportation (and paid a $110 fee) he would be given work authorization. (*Id.* at 155.) Mr.

Lovo testified he does not know of any other nationalities that received the same treatment, and that this was inducement for Nicaraguans to submit applications for suspension of deportation. Mr. Lovo further testified that since the ruling in N-J-B many of his clients have been denied work authorization. (Id. at 156.) Mr. Lovo submitted documents (Exs. 8 and 9) signifying a denial of an application and work authorization based on N-J-B. Mr. Lovo testified that under the current circumstances, clients can be deported without having the ability to appeal to the Eleventh Circuit, as they do not have a final administrative ruling. (*Id.* at 160.)

CONCLUSION

The Court finds, for the reasons set forth in the foregoing opinion, that the Plaintiff class members have demonstrated their entitlement to preliminary injunctive relief prayed for in their complaint by establishing: (1) that there is substantial likelihood of success on the merits, (2) that the preliminary injunction is necessary to prevent irreparable injury, (3) that the injury to the Plaintiff class outweighs any harm to the Defendants, and (4) that the preliminary injunction would serve the public interest. It is, therefore ORDERED, ADJUDGED and DECREED that the Defendants, Janet Reno, Attorney General of the United States, Robert Wallis, District Director, Immigration and Naturalization Service, Department of Justice, and Board of Immigration Appeals, and their agents, employees, lawyers and persons acting under the direction and control, be and they are hereby, preliminarily enjoined from (1) deporting any member of the Plaintiff class, and (2) enforcing Matter of N- J-B or otherwise pretermitting applications for suspension of deportation based on the Defendants' policy as expressed in said Matter of N-J-B. It is further ORDERED, ADJUDGED and DECREED that the bond heretofore posted by the Plaintiff class upon the entry of the temporary restraining order on May 14, 1997, shall constitute the appropriate and proper bond to stand as security under Fed.R.Civ.P. 65(c) during the pendency of this preliminary injunction. It is

further ORDERED, ADJUDGED and DECREED that a trial in this case shall commence on January 5, 1998. DONE AND ORDERED.

APPENDIX C
No. 97-0805-CIV-KING.

United States District Court,

S.D. Florida.

Feb. 10, 1998.

Roberto TEFEL, *et al.*,

Plaintiffs,

v.

Janet RENO, Attorney General of the United States, *et al.*,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISSOLVE INJUNCTION, MOTION TO DISMISS, AND MOTION FOR SUMMARY JUDGMENT

JAMES LAWRENCE KING, District Judge.

THIS CAUSE comes before the Court on Defendants' Motion to Dissolve Injunction, Motion to Dismiss as Moot as to Certain Class Members, and Motion for Summary Judgment as to the Remaining Class, filed December 22, 1997. Plaintiffs responded on January 6, 1998, and Defendants replied on January 16, 1998.

I. Factual and Procedural Background

A. Events Culminating in the Preliminary Injunction

Just like the statutes that spawned it, this case has a complicated history. Plaintiffs, who represent a class consisting of aliens, primarily Nicaraguans, under the threat of deportation, brought suit in this Court to challenge Defendants' interpretation and retroactive application of section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. 104-208, Div. C, 110 Stat. 3009, 3009-545 to 3009-724. Section 309(c)(5) is one of the statute's transitional rules, which serve to phase in the substantial changes that IIRIRA made to the nation's immigration laws, codified in the Immigration and Nationality Act ("INA").

Section 309(c)(5) governs the timing of applications for suspension of deportation. Prior to IIRIRA, that form of relief required that the applicant establish continuous physical presence in the United States for a period of seven years prior to the filing of her application for suspension. IIRIRA changed the way in which the applicant's continuous physical presence is counted by ending that period when the applicant was issued a notice to appear, instead of when the applicant filed an application for suspension. This is IIRIRA's so-called "stop-time" provision. Section 309(c)(5) applied the stop- time provision's methodology to "notices to appear issued before, on, or after the date of the enactment of this Act [Sept. 30, 1996]." IIRIRA § 309(c)(5), 110 Stat. at 3009-627.

One of the many complexities engendered by IIRIRA, however, was that "notices to appear" were termed "orders to show cause"[1] before IIRIRA was passed. Thus, it was unclear whether IIRIRA's stop-time provision applied to aliens issued

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[1] Both of these terms refer to documents issued by the Immigration and Naturalization Service to aliens in order to commence deportation proceedings against them.

orders to show cause prior to September 30, 1996. In Matter of N-J-B, Int. Dec. 3309 (B.I.A.1997), the Board of Immigration Appeals ("BIA") decided that the stop-time provision did indeed cover orders to show cause issued prior to IIRIRA's enactment. As a result, many aliens placed in deportation proceedings prior to the passage of IIRIRA found themselves subject to its more stringent requirements. If they had been issued an order to show cause before being continuously present in the United States for more than seven years, then they failed to meet the statutory requirements for suspension. Consequently, their applications, if already filed, were pretermitted.

When they initially filed this lawsuit, Plaintiffs sought to enjoin Defendants from enforcing N-J-B 's interpretation of IIRIRA section 309(c)(5), which, if implemented, would have deprived Plaintiffs of a hearing on their applications for suspension of deportation. Among other things, Plaintiffs alleged in their Complaint that this interpretation conflicted with both statutory and constitutional mandates. On May 14, 1997, this Court denied Defendants' Motion to Dismiss for lack of subject matter jurisdiction, and on June 24, 1997, granted Plaintiffs a preliminary injunction. In so doing, the Court found that Plaintiffs were likely to succeed on their constitutional due process claim. The Court thus enjoined Defendants from "(1) deporting any member of the Plaintiff class, and (2) enforcing Matter of N-J-B or otherwise pretermitting applications for suspension of deportation based on the Defendants' policy as expressed in said Matter of N-J-B." (Prelim. Inj. at 64.) The Court described the Defendants' policy as "to strip the Plaintiffs and class members of their right to seek suspension of deportation by applying § 309(c)(5) of [IIRIRA] retroactively to bar [claims for suspension of deportation]." (*Id.* at 4.)

B. Events Subsequent to the Preliminary Injunction

After the Court issued the preliminary injunction, both the executive and legislative branches took actions that bear directly on the issues in this case. First, on July 10, 1997,

Attorney General Janet Reno vacated the BIA's decision in Matter of N-J-B pending further review. Shortly thereafter, Defendants appealed this Court's preliminary injunction and order denying Defendants' motion to dismiss to the U.S. Court of Appeals for the Eleventh Circuit. In light of the Attorney General's vacatur of Matter of N-J-B, Plaintiffs/Appellees filed a motion to dismiss Defendants' appeal as moot. That motion is still pending before the Eleventh Circuit.

Meanwhile, Congress was working on legislation to temper some of IIRIRA's harsher effects. On November 19, 1997, the President signed into law the Nicaraguan Adjustment and Central American Relief Act of 1997 ("NACARA"), Pub.L. 105-100, tit. II, 111 Stat. 2160, 2193-2201, amended by Pub.L. 105-139, 111 Stat. 2644. NACARA effects several more changes to the nation's immigration scheme. First, it codifies Matter of N-J-B 's interpretation of IIRIRA section 309(c)(5) Thus, NACARA clarifies that IIRIRA's stop-time provision does apply to orders to show cause issued before IIRIRA's effective date, cutting off an alien's continuous physical presence at the point when she is issued the order to show cause. NACARA § 203(a)(1).

While NACARA thus purports to strip many aliens of the right to apply for suspension of deportation, it simultaneously exempts large classes of aliens from this very result. Certain qualifying Salvadorans, Guatemalans, and Eastern Europeans are exempted from the stop-time provision, and may apply for suspension of deportation (or cancellation of removal, as it is now termed) using the old method for calculating continuous physical presence. Id. In addition, another section of NACARA, while not exempting Nicaraguans and Cubans from the stop-time provision, renders that provision irrelevant by granting them the opportunity to apply directly for legal permanent residency status. Id. § 202. In effect, this amnesty provision grants

those aliens who qualify far greater relief than they could have obtained even under pre-IIRIRA law.

All of these events have led Defendants to now argue that the Court should dissolve its injunction; dismiss the action as moot as to those class members, namely Nicaraguans, Cubans, Salvadorans, Guatemalans, and Eastern Europeans, to whom NACARA either grants amnesty or exempts from the stop-time provision; and grant Defendants summary judgment as to the remaining class members, because of NACARA's codification of Matter of N-J-B. In response, Plaintiffs argue that the preliminary injunction has not been mooted as to certain class members by the passage of NACARA because at this point it is still impossible to determine exactly which Plaintiffs will benefit from NACARA's exemption and amnesty provisions; and that a motion for summary judgment as to the remainder of the class is premature in the absence of further factual discovery.

II. Analysis

A. The Court Will Not Exercise Its Discretion To Dissolve the Preliminary Injunction Because Plaintiffs Continue To Have Viable Constitutional Claims

Inherent in a district court's equitable power is the authority to revisit and, if necessary, to modify the terms of an ongoing preliminary injunction.

There is no doubt that the district court has continuing jurisdiction over a preliminary injunction. In the exercise of that jurisdiction, the court is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason.

Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 578 (5th Cir.1974)[2] (*citations omitted*); accord *League of United Latin Am. Citizens v. Pasadena Indep. Sch. Dist.*, 672 F.Supp. 280, 281 (S.D.Tex.1987). When deciding whether to grant such a modification, "a court is charged with the exercise of the same discretion it exercised in granting or denying injunctive relief in the first place." *Sierra Club v. United States Army Corps of Engineers*, 732 F.2d 253, 256 (2d Cir.1984). A court's determination in this regard is reversible only for an abuse of discretion. *See Sea-Land Serv., Inc. v. International Longshoremen's Ass'n of N.Y.*, 625 F.2d 38, 40 (5th Cir.1980).

The Court agrees with Defendants that an intervening change in the governing law would be one circumstance warranting a reappraisal of a court's injunction. Indeed, a change in the law is also grounds for modification of a permanent injunction, even though permanent injunctions need not be altered absent a more stringent showing of changed circumstances. For example, in *Rufo v. Inmates of Suffolk County Jail*, the Supreme Court noted, in the context of consent decrees in institutional reform litigation, that there is "no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." 502 U.S. 367, 380, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) (quoting *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961)); accord *Hodge v. Department of Hous. & Urban Dev.*, 862 F.2d 859, 861-62 (11th Cir.1989); *Elgin Nat'l Watch Co. v. Barrett*, 213 F.2d 776, 780 (5th Cir.1954).

Based on this reasoning, Defendants argue that the passage of NACARA justifies dissolution of this Court's

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[2] The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions issued prior to October 1, 1981. *See Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

injunction. Without question, NACARA impacts on the issues in this case. Its codification of the BIA's interpretation of IIRIRA section 309(c)(5) directly refutes this Court's conclusion that Matter of N-J-B was likely wrongly decided. Therefore, Plaintiffs' allegation that Defendants are misapplying and thus violating IIRIRA necessarily fails. Plaintiffs cannot continue with that claim in the face of NACARA's unambiguous directive.

However, only to the extent just noted are Plaintiffs' arguments invalidated. As Plaintiffs point out, their Complaint also alleges that retroactive enforcement of section 309(c)(5), as interpreted in Matter of N-J-B and now explicitly codified through NACARA, violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706, 3105, 3344 (1994 & Supp.1997), and Fifth Amendment due process. The Court considered these arguments in its order granting the preliminary injunction and specifically found that Plaintiffs had a likelihood of success on the merits of their constitutional claim. Examining the scheme by which Defendants were pretermitting certain aliens' applications for adjustment, the Court concluded, "Distinctions such as these are wholly irrational and not related to any legitimate governmental interest." (*Prelim.Inj.* at 37.)

The passage of NACARA does nothing to change this. Because NACARA only amends IIRIRA, with the amendments to take effect as if originally enacted in IIRIRA, see NACARA § 204(e), it is still the retroactive application of IIRIRA section 309(c)(5) that Plaintiffs are challenging on constitutional grounds. In fact, Plaintiffs in their Verified Complaint specifically seek "a declaration that the Defendants/Respondents' conduct violates IIRIRA, the INA, the APA, and the due process of the Constitution of the

United States." (Compl. at 28.) [3] That conduct is the practice of applying section 309(c)(5) so as to bar, retroactively, suspension of deportation relief in certain cases. The Court cannot now ignore this viable argument in order to dissolve the preliminary injunction. The protection it affords Plaintiffs is needed pending a resolution of Plaintiffs' constitutional claim.

B. The Preliminary Injunction Is Not Moot

Defendants' next argument is that the preliminary injunction is moot as to those class members who are granted specific relief in NACARA. As the Supreme Court has explained, "mootness [is] the 'doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (*quoting Henry Monaghan, Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)). This requirement devolves from the constitutional prohibition on federal courts issuing advisory opinions. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975).

As Defendants correctly argue, a statutory change may be sufficient to render moot pending litigation. *See, e.g., Native Village of Noatak v. Blatchford*, 38 F.3d 1505 (9th Cir.1994); *Hodge*, 862 F.2d at 859; *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346 (D.C.Cir.1997). Regardless of whether the intervening change is legal or factual, however, the key in determining mootness is whether the Court can still "affect the rights of litigants in the case before [it]." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

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[3] The Court acknowledges, however, that both the legislative activity and the changes in executive practice that have occurred may necessitate amendments in the pleadings presently before the Court.

As noted above, NACARA provides two categories of relief from application of section 309(c)(5). First, qualifying Nicaraguans and Cubans, although not technically exempt from section 309(c)(5), receive amnesty in the form of the ability to apply for adjustment of status. They therefore can apply directly to become legal permanent residents and need not worry about applying for suspension of deportation. Second, other qualifying aliens who are Salvadoran, Guatemalan, or Eastern European are exempt from section 309(c)(5). As a result, they may apply for suspension of deportation under the pre-IIRIRA rules and have a hearing on their petition.

Defendants argue that because NACARA grants these class members the ultimate relief they seek, namely avoiding deportation due to an inability to pursue applications for suspension, the injunction is now moot as to them. The Court disagrees. Although NACARA makes it clear that certain class members will receive the relief they seek, it is not clear at this time who those class members are. Plaintiffs point to the INS's failure to implement regulations as evidence that it is impossible to currently ascertain which members of the class will be protected by NACARA's provisions. Regulations are not necessary in order for a statute to create a mootness problem. Rather, the lack of regulations points to the potential that some of the class members purportedly protected by NACARA will be bereft of relief once future regulations specify who is a "qualifying" Nicaraguan, Cuban, Salvadoran, Guatemalan, and Eastern European.

Defendants themselves have recognized this possibility. In their response to Plaintiffs' Motion to Dismiss Appeal as Moot, currently pending before the Eleventh Circuit, Defendants stated to the court that "even some Salvadoran, Guatemalan, and Eastern European members of the class may not qualify for the exception from the stop-time provision" and that "[i]t is possible, however, that that [sic] there may be some Nicaraguans and Cubans who will be ineligible for amnesty under NACARA." (Appellants' Opp'n to Appellees'

Mot. to Dismiss Appeal as Moot at 23, 25-26) (internal footnotes omitted). In light of these representations to the Eleventh Circuit, it is disingenuous for Defendants to now argue to this Court that "there are no unidentified plaintiffs and class members who are entitled to seek relief under NACARA." (Defs.' Reply at 6.) In light of these uncertainties, the Court will not deprive Plaintiffs of the protection of the preliminary injunction by dismissing their claims as moot.

C. Defendants Are Not Entitled to Summary Judgment

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court must view the evidence in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant meets this burden, the burden then shifts to the nonmoving party to establish that a genuine dispute of material fact exits. *See Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir.1993). If the evidence relied on is such that a reasonable jury could return a verdict in favor of the nonmoving party, then the Court should refuse to grant summary judgment. *See id.* at 919.

As discussed above, Plaintiffs continue to have a viable constitutional claim, and they have presented evidence to support it. In the absence of further discovery, and in light of the fact that Defendants have failed to meet their burden of showing that there is no genuine dispute of material fact, the Court will deny summary judgment at this point.

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendants' Motion to Dissolve Injunction, Motion to Dismiss as Moot as to Certain Class Members, and Motion for Summary Judgment as to the Remaining Class be, and the same is hereby, DENIED.

DONE and ORDERED at the James Lawrence King Federal Justice Building and United States District Courthouse, Miami, Florida, this 10th day of February, 1998.

Supreme Court, U.S.
FILED
MAY 05 2000
CLERK

No. 99-1314

In the Supreme Court of the United States

ROBERTO TEFEL, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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84 pp

QUESTIONS PRESENTED

In Section 309(c)(5)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, 110 Stat. 3009-627, as amended by Section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2196, Congress provided generally (but subject to various exceptions) that an alien is not eligible for suspension of deportation and adjustment of status under former 8 U.S.C. 1254(a) (repealed 1996) unless the alien was continuously present in the United States for seven years before being served with the Order to Show Cause commencing the alien's deportation proceedings. The questions presented are:

1. Whether IIRIRA § 309(c)(5)(A) deprived petitioners without due process of law of a constitutionally protected right to seek relief in the form of suspension of deportation; and

2. Whether the government should be estopped from applying IIRIRA § 309(c)(5)(A) in the cases of Nicaraguan nationals because, before IIRIRA was enacted, the Immigration and Naturalization Service publicly promoted a program under which Nicaraguan nationals were permitted to move to reopen their deportation proceedings and apply for suspension of deportation, upon payment of a fee.

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 180 F.3d 1286. The decision of the district court denying the government's motion to dismiss the complaint and provisionally certifying the class is reported at 972 F. Supp. 608. The decision of the district court entering the preliminary injunction (Pet. App. A37-A88) is reported at 972 F. Supp. 623. The decision of the district court denying the government's motion to dissolve the preliminary injunction (Pet. App. A89-A99) is reported at 996 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1999. A petition for rehearing was denied on October 6, 1999. On December 30, 1999, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including February 3, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents a challenge to the enforcement of Section 309(c)(5)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, Div. C, Tit. III, 110 Stat. 3009-627, as amended by Section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2196. IIRIRA § 309(c)(5)(A) provided that an alien who applied for suspension of deportation under former 8 U.S.C. 1254(a) (repealed 1996) is not eligible for such relief unless the alien was continuously present in the United States for seven years before the alien was served with the Order to Show Cause (OSC) commencing the alien's deportation proceedings. That seven-year cutoff at the time of service of the OSC is known as the "stop-time rule." Petitioners contend that the stop-time rule of IIRIRA § 309(c)(5)(A) deprives them, without due process of law, of a constitutionally protected right to apply for suspension of deportation. They also contend that the government should be estopped from applying IIRIRA § 309(c)(5)(A) in the cases of Nicaraguan nationals because, before the enactment of IIRIRA, the Immigration and Naturalization Service (INS) promoted a program under which certain Nicaraguan nationals who were subject to orders of deportation could move to reopen their deportation proceedings and apply for suspension of deportation. The district court entered a preliminary injunction preventing the government from applying the stop-time rule in administrative deportation proceedings involving members of the class, but the court of appeals vacated the injunction, finding that petitioners had not established a likelihood of success on the merits of either claim.

1. Before the amendments to the Immigration and Nationality Act (INA) enacted by IIRIRA in 1996, an alien who was subject to deportation could apply for suspension of

deportation and adjustment of status to that of a lawful permanent resident (LPR). 8 U.S.C. 1254(a). Such relief was available in the discretion of the Attorney General. To qualify for consideration for suspension of deportation, the alien was required to demonstrate, *inter alia*, that he had been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application [for relief]." 8 U.S.C. 1254(a)(1).[1] The time that an alien spent in deportation proceedings before issuance of a final order of deportation was counted toward the requirement of seven years' continuous physical presence in the United States. See, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981).

2. On June 12, 1995, before the enactment of IIRIRA, the Attorney General terminated a special program established in 1987 for review of deportation orders affecting Nicaraguan nationals.[2] She also authorized the INS to institute a transitional program, under which certain Nicaraguans subject to final orders of deportation with seven years of continuous physical presence in the United States could file motions to reopen their deportation proceedings in order to apply for suspension of deportation and adjustment of

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[1] The alien was also required to demonstrate that he was of good moral character and that his deportation would result in "extreme hardship" to himself or a spouse, parent or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1).

[2] Under the Nicaraguan Review Program (NRP), the files of Nicaraguan nationals subject to final orders of deportation were subject to mandatory review by the INS and the Office of the Deputy Attorney General. See Complaint Exh. 2. The NRP was established by Attorney General Meese to provide an additional level of review for Nicaraguans whose applications for asylum were denied. Complaint Exh. 4. Three years after the transition to a democratically elected government in Nicaragua, Attorney General Reno determined that it was no longer necessary to continue the NRP. *Ibid.*

status. Complaint Exh. 3.[3] Under that transitional program, a Nicaraguan who filed a motion to reopen could remain in the United States pending the adjudication of the application for suspension of deportation, and could apply for work authorization. Complaint Exhs. 2, 3. The INS also reiterated that Nicaraguans who feared persecution on account of political opinion could apply for asylum. Complaint Exhs. 2, 4.

3. On September 30, 1996, Congress enacted IIRIRA. That statute abolished the old distinction between deportation and exclusion proceedings, repealed the provision for suspension of deportation in former 8 U.S.C. 1254(a), instituted a new form of proceeding known as "removal," and established a new form of discretionary relief from removal, known as "cancellation of removal." See 8 U.S.C. 1229(a), 1229b (Supp. IV 1998). Under the latter provision, the Attorney General may in her discretion cancel the removal of an alien if the alien demonstrates, among other things, that he has resided in the United States continuously for seven years (if the alien is an LPR) or has been continuously present in the United States for ten years (if the alien is not an LPR). 8 U.S.C. 1229b(a) and (b) (Supp. IV 1998).

For purposes of eligibility for cancellation of removal, however, the required continuous residence or physical presence is "deemed to end when the alien is served a notice to appear," 8 U.S.C. 1229b(d)(1) (Supp. IV 1998), not when the alien makes his application for relief. The Notice to Appear is the document that commences removal proceedings under IIRIRA, and replaces the old Order to Show Cause, which commenced deportation proceedings under the INA before IIRIRA. See 8 U.S.C. 1229(a) (Supp. IV 1998). Thus,

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[3] Prospective applicants were informed that the fee for a motion to reopen was $110, and that the fee for an application for suspension of deportation, to accompany the motion to reopen, was an additional $100. Complaint Exh. 4.

IIRIRA instituted a new "stop-time" rule under which the service of the Order to Show Cause cuts off the time that is counted towards establishing an alien's eligibility for cancellation of removal, and the time that an alien spends in removal proceedings is not counted.

The new cancellation of removal provisions (including the ten-year eligibility requirement for aliens who are not LPRs) were generally not made applicable to aliens whose immigration proceedings were commenced prior to April 1, 1997, the general effective date of IIRIRA. IIRIRA did, however, contain a special "transitional rule with regard to suspension of deportation," which provided that the new stop-time rule was to apply to "notices to appear" issued before, on, or after the date of enactment of IIRIRA, *i.e.*, September 30, 1996. Specifically, IIRIRA § 309(c)(5) provided:

> TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [(8 U.S.C. 1229b(d) (Supp. IV 1998))] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

110 Stat. 3009-627.

4. A predecessor to the statute that eventually became IIRIRA was introduced in the House of Representatives as H.R. 1915 on June 22, 1995. 141 Cong. Rec. 16,881 (1995). That bill contained a Section 309(c)(5), the predecessor to what was ultimately enacted as IIRIRA § 309(c)(5). That provision contained language to the effect that, for applications for suspension of deportation pending more than 30 days after enactment, the period of continuous physical presence would be deemed to have ended when the alien was served an Order to Show Cause, even if the application for suspension had been filed before the enactment of the

legislation.[4] The Justice Department did not endorse that provision, generally described the curtailing of discretionary relief in the proposed legislation as "drastic," and urged that some form of discretionary relief from removal be retained. See Resp. Exh. B2, at 3. On August 4, 1995, H.R. 1915 was withdrawn from consideration, and new H.R. 2202 was introduced in its stead. 141 Cong. Rec. 22,112 (1995). H.R. 2202 contained a version of Section 309(c)(5) materially identical to the version in H.R. 1915. See H.R. 2202, 104th Cong., 1st Sess. § 309(c)(5) (1995). The Justice Department expressed concern regarding the proposed Section 309(c)(5) in the new bill, and urged that the then-current rules on physical presence in the United States remain in effect for already-pending applications. See Resp. Exh. B3, at 34.

The House Judiciary Committee reported H.R. 2202 with a significantly changed version of Section 309(c)(5). Consistent with the Justice Department's position, the Committee's version would have applied the cut-off date only to cases initiated after the enactment of the Act. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 42 (1996). The Justice Department expressed support for that newly drafted version of Section 309(c)(5). Resp. Exh. B4, at 38. On March 21, 1996, the House of Representatives passed H.R. 2202 with the amended version of Section 309(c)(5) and sent the bill to the Senate. 142 Cong. Rec. 6015 (1996).

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[4] That bill would have provided:

> In applying section 244(a) of the Immigration and Nationality Act (as in effect before the date of the enactment of this Act) with respect to an application for suspension of deportation which is filed before, on, or after the date of the enactment of this Act and which has not been adjudicated as of 30 days after the date of the enactment of this Act, the period of continuous physical presence under such section shall be deemed to have ended on the date the alien was served an order to show cause pursuant to section 242A of such Act (as in effect on such date of enactment).

H.R. 1915, 104th Cong., 1st Sess. § 309(c)(5) (1995).

On April 15, 1996, the Senate began floor consideration of a separate immigration bill (S. 1664). 142 Cong. Rec. 7295 (1996). That bill did not contain any provisions regarding suspension of deportation. See S. 1664, 104th Cong., 2d Sess. (1996); S. Rep. No. 249, 104th Cong., 2d Sess. (1996). On May 2, 1996, the Senate replaced the provisions of H.R. 2202 with those of S. 1664, and passed the bill, which was then sent to a Conference Committee. See 142 Cong. Rec. 10,065 (1996).

On September 24, 1996, the Conference Committee submitted to both Houses a Report containing a new version of the legislation, which adopted restrictions on suspension of deportation derived from the House's version of the legislation and applied a stop-time rule based on service of the Notice to Appear on the alien. The Conference Report also inserted language into Section 309(c)(5) providing for the application of the new stop-time rule to applications for suspension of deportation in cases in which a notice to appear had been issued before the date of enactment of the proposed act. See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 62 (1996). On September 28, 1996, H.R. 2202 was withdrawn, and the version of the bill that had been reported in the Conference Report was introduced in the House as part of H.R. 3610, an appropriations bill. 142 Cong. Rec. 26,091-26,139 (1996). The House passed H.R. 3610 on September 28, 1996, see *id.* at 26,112-26,113, and the Senate passed it on September 30, 1996, see *id.* at S11,936. It was signed by the President on September 30, 1996, and IIRIRA § 309(c)(5) was therefore duly enacted.

5. After enactment of IIRIRA, aliens in deportation proceedings argued that the new stop-time rule of IIRIRA did not apply to proceedings commenced before the full effective date of IIRIRA, April 1, 1997. That argument was based on language in Section 309(c)(5) directing that the new stop-time rule be applied in cases in which a "notice to appear" had been issued; under deportation proceedings initiated before IIRIRA's effective date, no document known as a

"notice to appear" existed, and proceedings were commenced by service of an Order to Show Cause.

On February 20, 1997, the Board of Immigration Appeals (BIA), in a case involving petitioner Baldizon, rejected that argument, and held that IIRIRA § 309(c)(5) required that the new stop-time rule be applied to all pending and future deportation proceedings, including those commenced before IIRIRA was enacted. *In re N-J-B-*, Int. Dec. No. 3415 (B.I.A. Feb. 20, 1997). The BIA concluded that the term "notice to appear" in IIRIRA § 309(c)(5) referred generically to a document initiating proceedings, and that, because Section 309(c)(5) expressly referred to such a document "issued before, on, or after" IIRIRA's enactment date, it necessarily included an Order to Show Cause issued before that date. *Id.* at 8-11. The BIA therefore held that, because of the new stop-time rule, Baldizon, who had entered the United States on August 5, 1987, who had been served with an Order to Show Cause on August 27, 1993 (less than seven years later), and whose application for suspension of deportation was still pending after the enactment of IIRIRA (more than seven years after her entry into the United States), was not eligible for suspension of deportation. *Id.* at 2, 13-14.

Baldizon filed a petition for review of the BIA's decision in the United States Court of Appeals for the Eleventh Circuit. *N-J-B-* v. *Reno*, No. 97-4400. On July 10, 1997, while that petition was pending, the Attorney General, exercising her authority under 8 C.F.R. 3.1(h)(1)(i), vacated the BIA's decision in *N-J-B-* and certified that case to herself for her review and determination. See *In re N-J-B-*, Int. Dec. No. 3415, at 39 (A.G. July 10, 1997). The Eleventh Circuit then dismissed Baldizon's petition for review for lack of jurisdiction because the Attorney General's vacatur of the BIA's decision rendered Baldizon's deportation order nonfinal. *N-J-B-* v. *Reno*, No. 97-4400 (July 27, 1999).

6. Meanwhile, on March 28, 1997, petitioners, aliens who had applied for suspension of deportation, filed this case as a class action in district court. The named plaintiffs were more than 30 Nicaraguan nationals, one Salvadoran national, one Haitian, one Malaysian, and one Iranian.[5] Count 1 of the complaint alleged that the BIA's construction of the stop-time rule of IIRIRA § 309(c)(5) in *N-J-B-* as applying to deportation proceedings commenced before IIRIRA's effective date was arbitrary and capricious and contrary to the INA. Count 2 alleged that the same application violated constitutional principles of equal protection and due process. Count 3 alleged that the government was estopped from enforcing IIRIRA § 309(c)(5) against the members of the class who are Nicaraguan nationals, because, before IIRIRA was enacted, the government had allegedly induced them into applying for suspension of deportation and paying fees for such applications.[6] As relief, petitioners requested that

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[5] The proposed class was defined as follows:

> All individuals within the states of Georgia, Alabama and Florida who have been or will be denied suspension of deportation as a result of the BIA's decision to apply the transitional rule of § 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) retroactively to persons who have sought or are seeking suspension of deportation.

Complaint ¶ 55. Petitioners further described the class as follows:

> This case also consists of a subclass of members within the class who are Nicaraguan nationals who paid substantial fees to reopen their cases and/or to seek suspension of deportation as a result of the defendants' inducements and promises that their applications for suspension would be considered when in fact the defendants now refuse to consider such applications.

Ibid.

[6] Count 4 alleged that petitioner Baldizon had been denied the right to counsel in her proceedings before the BIA. Complaint ¶¶ 75-76. The lower courts have not addressed that claim in detail, and it will not be further discussed in this brief. See Pet. App. A6 n.5.

the government be enjoined from adjudicating the suspension of deportation applications of class members on the basis of the BIA's decision in *N-J-B-*.

On May 20, 1997, the district court provisionally certified a class. *Tefel* v. *Reno*, 972 F. Supp. 608, 617-618 (S.D. Fla. 1997). On June 24, 1997, the district court granted petitioners' motion for a preliminary injunction, and prohibited respondents from enforcing *N-J-B-*, or pretermitting applications for suspension of deportation based on *N-J-B-*, against any class member Pet. App. A37-A88. In ruling that petitioners had a substantial likelihood of success on the merits, the court concluded that the BIA had misinterpreted IIRIRA § 309(c)(5) in *N-J-B-* (*id.* at A56-A58); that the BIA's interpretation deprived petitioners of due process because the INS's previous actions in encouraging Nicaraguan nationals to apply for suspension of deportation had created "a property or liberty interest in the right to a hearing on their claims for suspension of deportation," which claims were now pretermitted by the *N-J-B-* decision (*id.* at A65); and that the government should be estopped from applying IIRIRA § 309(c)(5) to Nicaraguan class members because, in 1995 and 1996, it had encouraged those class members to apply for suspension of deportation even though it was "well aware * * * that there was a substantial likelihood that suspension of deportation in one manner or another would be drastically curtailed" by Congress, but had not disclosed that fact to class members (*id.* at A70) (internal quotation marks omitted).

7. On November 19, 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2193. Section 203(a)(1) of NACARA amended IIRIRA § 309(c)(5) to make clear that the stop-time rule of IIRIRA does apply even to deportation proceedings opened before April 1, 1997, by service of an Order to Show Cause (rather than a Notice to

Appear).[7] Section 203(f) of NACARA also made that amendment effective as if included in the original enactment of IIRIRA. 111 Stat. 2200.

Section 203(a)(1) of NACARA also created important exceptions to the new stop-time rule for certain qualifying aliens from El Salvador, Guatemala, and Eastern Europe. The exception allowed qualified nationals of those countries to apply for suspension of deportation or cancellation of removal without having their period of continuous physical presence stopped at the time an Order to Show Cause or Notice to Appear was served on them. See NACARA § 203(a)(1), 111 Stat. 2196-2198 (adding new IIRIRA § 309(c)(5)(C)).

Although NACARA § 203 did not exempt Nicaraguans from the stop-time rule for purposes of suspension of deportation, NACARA § 202 provided them with even broader relief. While other aliens must meet the continuous presence requirement with the application of the stop-time rule (unless they are exempt under NACARA § 203), and must also demonstrate that they are eligible for suspension of deportation under prior 8 U.S.C. 1254(a) by establishing extreme hardship before having their status adjusted to that of a lawful permanent resident, NACARA § 202 provided qualified Nicaraguans the opportunity to apply directly for adjustment of status to that of a lawful permanent resident,

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[7] NACARA § 203(a)(1) amended IIRIRA § 309(c)(5) to read in part as follows:

> (A) IN GENERAL.— * * * [P]aragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to *orders to show cause* (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

111 Stat. 2196 (emphasis added).

without the need also to apply for suspension of deportation. Under this special adjustment provision, any Nicaraguan who has been physically present in the United States continuously since at least December 1, 1995, and who is otherwise admissible in accordance with certain specified provisions, is eligible to have his status adjusted to that of an LPR if he has applied before April 1, 2000; the alien need not establish extreme hardship. See NACARA § 202(b)(1), 111 Stat. 2194. A similar privilege was extended to certain Haitian nationals in the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, Div. A, sec. 101(h), Tit. IX, § 902(b), 112 Stat. 2681-538.

8. The government moved in the district court for dissolution of the injunction, contending that NACARA had codified the BIA's interpretation of IIRIRA § 309(c)(5) in *N-J-B-*. On February 10, 1998, the district court denied that motion. Pet. App. A89-A99. Although the district court agreed that Congress's "codification [in NACARA] of the BIA's interpretation of IIRIRA section 309(c)(5) directly refutes this Court's conclusion that Matter of N-J-B- was likely wrongly decided," and that petitioners "cannot continue with that claim in the face of NACARA's unambiguous directive," *id.* at A95, it nevertheless concluded (*id.* at A95-A96) that petitioners' constitutional challenge to the application of IIRIRA § 309(c)(5) to their cases was unaffected by NACARA. The government appealed from the district court's order denying the motion to dissolve the preliminary injunction.

9. The court of appeals reversed the district court's conclusion that petitioners had shown a likelihood of success on the merits, vacated the preliminary injunction, and remanded for further proceedings, including a reexamination of the certification of the class. Pet. App. A1-A36.

The court of appeals rejected the district court's conclusion that the petitioners' expectation in having their suspension-of-deportation applications adjudicated in any

particular manner constituted a constitutionally protected liberty or property interest, and that subjecting them to new requirements might constitute a deprivation of due process. Pet. App. A24-A29. Although the court accepted the proposition that the INS had encouraged Nicaraguans to apply for suspension of deportation before IIRIRA's enactment, it held that the "expectation" among Nicaraguan nationals that they would be considered for suspension did not amount to a liberty or property interest. *Id.* at A25. Relying on this Court's decision in *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981), the court observed that, where the executive has "unfettered discretion" to award relief, no liberty interest in that form of relief arises, even if the executive "consistently" grants such relief, or grants such relief in "most" cases. Pet. App. A25-A27. Since the Attorney General "possesses broad discretion in awarding suspension of deportation," *id.* at A27, and such a grant amounts to an "act of grace," *id.* at A28, the court concluded that no liberty or property interest in applying for suspension of deportation had been created, *ibid.*

The court also rejected petitioners' effort to employ estoppel against the government as a means of avoiding application of the statutory stop-time rule. Pet. App. A29-A34. The court first held that, even if estoppel may ever be applied against the government, the party seeking estoppel must demonstrate (in addition to the traditional elements of estoppel) "affirmative misconduct" on the part of the government. *Id.* at A32. Although the court of appeals was uncertain whether the district court had proceeded on the assumption that affirmative misconduct is a necessary element of estoppel against the government (*ibid.*), it rejected petitioners' theory that the government's actions in encouraging Nicaraguans to apply for suspension of deportation under prior law, even while being aware that Congress might change the law, amounted to affirmative misconduct (*id.* at A32-A33). The court observed (*ibid.*) that

"Congress sometimes appears likely to do things it never actually does, and the INS was entitled to operate under existing law until it was changed."

The court of appeals also directed the district court to reconsider its provisional certification of the class. Pet. App. A34-A35. The court observed that the class does not appear to meet the commonality requirement of Federal Rule of Civil Procedure 23(a)(2), in that the district court's decisions focused almost exclusively on INS actions directed towards Nicaraguan nationals, and yet its injunction encompassed non-Nicaraguans as well. Pet App. A34. The court also noted that NACARA had placed the Nicaraguan petitioners in a different legal position from that of the non-Nicaraguan petitioners. *Id.* at A35. In that regard, the court stated that passage of NACARA raised serious questions whether the named plaintiffs, who consist mostly of Nicaraguans, remain adequate class representatives. *Ibid.*[8]

10. Since the filing of the complaint, most of the named Nicaraguan petitioners have become legal permanent resident aliens.[9] The remaining named Nicaraguan petitioners

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[8] On remand, the government moved for decertification of the class, summary judgment, and dismissal. Petitioners requested a stay of the proceedings without a ruling on the government's motions, in light of their intention to file a certiorari petition. The government did not oppose that request, and on January 13, 2000, the district court stayed all proceedings on remand pending this Court's disposition of the petition.

[9] Our information respecting the status of the named petitioners has been obtained from the INS and the Executive Office of Immigration Review (EOIR), the separate component of the Department of Justice that is responsible for adjudicating deportation and removal proceedings before immigration judges (IJs) and the BIA.

Two of the named Nicaraguan petitioners (Lucretia Raudes and Carlos Morales) obtained LPR status before the filing of the lawsuit; they were granted suspension of deportation by an IJ, and the INS did not appeal those rulings to the BIA. See Complaint ¶¶ 12, 15.

In the cases of five named petitioners (Jaime Enriquez, Martha Enriquez, Edgar Enriquez, Freddy Quintero, and Ricardo Fonseca), the

have applied for adjustment of status under NACARA § 202 and are awaiting adjudication of their applications.[10] Petitioner Alexandra Charles, a Haitian national, has applied for adjustment of status under the Haitian Refugee Immigration Fairness Act. The stop-time rule of IIRIRA § 309(c)(5) appears not to apply to petitioner Roberto Amaya, a Salvadoran national whose deportation proceeding is currently pending before the BIA, because of the ex-

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IJ granted suspension of deportation, and after the filing of this lawsuit, the INS withdrew its appeals to the BIA.

The following 28 named Nicaraguan petitioners have become LPRs as a result of their applications for adjustment of status under NACARA § 202: Roberto Tefel, Leonel Martinez, Manuel Mantilla, Roberto Barberena, Lorena Garcia, Ana Borge, Ignacio Herrera, Nydia Mercado, Liliam Portillo, Sebastian Murillo, Jesus Chow, Gloria Guerrero, Douglas Membrano-Murillo, Damarys Contreras, Virginia Rodriguez, Juan Bermudez, Ricardo Bermudez, Leonte Martinez, Zulema Balladares, Boanerges Pao, Franklin Siu, Justina Jiron, Armando Largaespada, Herenia Matute, Enrique Sequeira, Dudley Rocha-Petterson, Ernesto Torres Sandoval, and German Reyes.

[10] The BIA remanded the case of petitioner Juan Gonzaga Baez to an IJ, who has scheduled a hearing on June 19, 2000, to adjudicate Baez's application for adjustment of status under NACARA § 202. Petitioner Norma J. Baldizon, whose deportation proceeding was certified to the Attorney General in *N-J-B-*, filed a motion to remand to apply for adjustment of status under NACARA; the Attorney General remanded her case to the BIA on August 20, 1999. The BIA further remanded her case to an IJ, who on January 7, 2000, terminated the deportation proceedings so that the INS may consider the merits of Baldizon's application for adjustment of status under NACARA. Similarly, the deportation proceedings of petitioner Carlos Rivas were closed at his request, so that he might file for adjustment of status under NACARA § 202. Petitioner Wilbur Baez withdrew as a class member on June 17, 1997. We have been unable to verify the current immigration status of petitioner Robert Rivera; no Nicaraguan national with that name has a case currently pending before the BIA, and Rivera's alien-registration number has not been provided to us in the course of this litigation. Based on the allegations in the complaint, however, Rivera appears to be eligible for adjustment of status under NACARA § 202.

emption for certain Salvadorans in NACARA § 203. In sum, it appears that only two named petitioners, Khadijeh Aidenezhad, an Iranian, and Subalecthumy Vengadasalam, a Malaysian, currently face the prospect of having the stop-time rule of IIRIRA § 309(c)(5) applied to their applications for suspension of deportation, which are currently pending before the Board of Immigration Appeals.

ARGUMENT

The court of appeals correctly concluded that petitioners could not establish a likelihood of prevailing on the merits of either their constitutional or their estoppel challenge to the application of the stop-time rule of Section 309(c)(5) of IIRIRA, and therefore are not entitled to a preliminary injunction. That decision does not conflict with any decision of this Court or any other court of appeals. In addition, the issues presented by this case are of little general or continuing importance, because petitioners' challenges concern only eligibility for a form of discretionary relief (suspension of deportation) that has been prospectively repealed by IIRIRA; most of the petitioners are or may be eligible for suspension of deportation or adjustment of status without regard to IIRIRA § 309(c)(5); and the cases of the remaining petitioners do not squarely present either the constitutional or estoppel claim. Further review is therefore not warranted.

1. Petitioners argue that the stop-time rule of IIRIRA § 309(c)(5) deprived them, without due process of law, of the right to apply for suspension of deportation, and that the government should be estopped from relying on that stop-time rule in the cases of Nicaraguan nationals because the government had previously encouraged Nicaraguan nationals in the plaintiff class to apply for suspension of deportation. Those claims are of little continuing or general importance. First, the application of IIRIRA § 309(c)(5) affects only aliens who have sought to apply for suspension

of deportation, pursuant to former 8 U.S.C. 1254(a), in deportation proceedings commenced under pre-IIRIRA law. For removal proceedings commenced on or after April 1, 1997, and thus governed by IIRIRA, however, suspension of deportation has been repealed (see IIRIRA § 308(b)(7), 110 Stat. 3009-615) and replaced by a new form of relief known as "cancellation of removal" that is subject to different substantive terms. See 8 U.S.C. 1229b (Supp. IV 1998). Thus, the claims in this case concern only deportation proceedings affected by IIRIRA's transitional rules, and do not implicate any removal proceedings under the permanent provisions of IIRIRA.

Second, legislation enacted after IIRIRA has rendered moot or irrelevant the constitutional and estoppel claims of almost all the named petitioners. Petitioners purport to represent a class of aliens within Georgia, Alabama, and Florida who have been or will be denied suspension of deportation based on the application of IIRIRA § 309(c)(5) to their pending applications. In 1997, however, Congress enacted NACARA, which allowed qualified Nicaraguan and Cuban nationals to apply for adjustment of status to LPR without the need also to apply for suspension of deportation, and therefore without regard to the stop-time rule of IIRIRA § 309(c)(5). See NACARA § 202(b)(1), 111 Stat. 2194. Virtually all class members who are Nicaraguan nationals benefit from NACARA § 202, as exemplified by the named Nicaraguan petitioners in this case, who have already applied for and (in the vast majority of cases) have been granted adjustment of status through NACARA § 202. See pp. 14-15, *supra*.[11] Further, Section 203 of NACARA

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[11] Petitioners observe (Pet. 8) that family members of Nicaraguan class members who are themselves not nationals of Nicaragua or Cuba are not eligible for adjustment of status under NACARA. Any such family members, however, could benefit from specific family-sponsored visa

exempted qualified nationals of El Salvador from the application of IIRIRA § 309(c)(5)(A), and the one named petitioner of Salvadoran nationality appears from the complaint to meet the requirements for that exemption. See NACARA § 203(a)(1), 111 Stat. 2196; pp. 15-16, *supra*. Finally, Section 902(b) of the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-538, allowed qualified Haitian nationals to seek adjustment of status in a manner similar to that provided for Nicaraguans under NACARA, and the one named petitioner who is a Haitian national also appears from the complaint to be eligible for adjustment of status under that Act. See p. 15, *supra*.

As the court of appeals observed in ordering the district court to reconsider the certification of the class (Pet. App. A16), post-IIRIRA enactments leave only two named petitioners affected by post-IIRIRA legislation: Khadijeh Aidenezhad, an Iranian, and Subalecthumy Vengadasalam, a Malaysian. But it is not clear that the case of either Aidenezhad or Vengadasalam actually presents a constitutional or estoppel challenge to IIRIRA § 309(c)(5).[12] Petitioners have argued, for example, that a constitutionally protected property interest in applying for suspension of deportation was created by, among other things, the government's alleged "conduct in inducing and misleading applicants to come forward to apply" for suspension. Pet. 12. But petitioners have not argued that this government conduct of encouraging applications for suspension of deportation was

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provisions once the Nicaraguan class members obtained LPR status under NACARA § 202. See, *e.g.*, 8 U.S.C. 1153(a)(2).

[12] Those two petitioners did raise at the outset the claim that the BIA's construction of IIRIRA § 309(c)(5) in *N-J-B-* was legally erroneous, but that claim was mooted by the passage of NACARA, which codified the BIA's decision in *N-J-B-* and made it effective as if enacted in IIRIRA. See pp. 10-11, *supra*.

directed at any aliens other than Nicaraguan nationals, who were in an unusual situation because of the Attorney General's 1995 termination of the special program for review of deportation orders affecting Nicaraguans. See pp. 3-4, *supra*. Therefore, even under petitioners' theory, no aliens other than Nicaraguans had a liberty or property interest in applying for suspension for deportation. Similarly, because the government's encouragement of applications for suspension of deportation was directed only at Nicaraguans, only Nicaraguans could even arguably raise an estoppel claim.[13]

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[13] The INS and EOIR have recently implemented a program under which certain deportation cases that were commenced before the effective date of IIRIRA and are still pending may be administratively closed without a final decision on the alien's deportability. This program is intended to benefit aliens who would be barred by the stop-time rule of IIRIRA § 309(c)(5) from receiving suspension of deportation under old 8 U.S.C. 1254(a), but who would not now be barred by the stop-time rule from receiving cancellation of removal under 8 U.S.C. 1229b (Supp. IV 1998), because the Notice to Appear would have been served on the alien at a later date. Under this program, the INS and the EOIR will (in the absence of unusual circumstances) administratively close old deportation cases that meet three criteria: (1) the alien is not presently an LPR; (2) the alien would be eligible for suspension of deportation but for the new stop-time rule; (3) the alien would meet the ten-year physical presence requirement for cancellation of removal under Section 1229b if served with a Notice to Appear under the permanent rules of IIRIRA; and (4) the alien would be statutorily eligible for cancellation of removal under Section 1229b. It is anticipated that, in the future, the INS will commence removal proceedings against these aliens, so that the aliens may apply for cancellation of removal under Section 1229b. See Memorandum from INS General Counsel Owen Cooper (Dec. 7, 1999); Memorandum from INS General Counsel Paul W. Virtue (Dec. 7, 1998) (lodged with the Clerk). It appears that petitioner Aidenezhad would be eligible for administrative closure under this program, but that petitioner Vengadasalam would not; cancellation of removal for an alien who is not an LPR requires the alien to demonstrate that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a citizen or an LPR, see 8 U.S.C. 1229b(b)(1)(D) (Supp. IV

2. Petitioners contend (Pet. 10-16) that, by enacting a stop-time rule that rendered them ineligible for the discretionary relief of suspension of deportation, Congress deprived them without due process of law of their constitutionally protected interest in applying for that relief. That contention is without merit.

As an initial matter, it is our position that, contrary to the ruling by the court of appeals on the point (see Pet. App. A17-A22), the district court did not have jurisdiction to entertain this suit. Petitioners seek to prevent immigration judges (IJs) and the Board of Immigration Appeals from applying the new statutory stop-time provision of IIRIRA and NACARA in deportation cases pending before them in which members of the petitioner class have applied for suspension of deportation. The proper way for petitioners to raise that claim, however, was to exhaust their administrative remedies before the IJ and the BIA, and then if relief were denied and the alien were ordered deported, to petition for review in the court of appeals pursuant to 8 U.S.C. 1105a. As this Court has specifically held, on petition for review, the alien may present any challenge he may have to the denial of suspension of deportation, see *Foti* v. *INS*, 375 U.S. 217 (1963), including a challenge based on constitutional grounds, see *INS* v. *Chadha*, 462 U.S. 919, 937-939 (1983). An alien may not avoid that exclusive procedure by separating out one issue that may bear on his deportation proceedings (including his application for suspension of deportation) and raising that issue in a suit filed in the district court. The cases on which the court of appeals relied to reach a contrary result involved alleged patterns of unconstitutional conduct *outside* the adjudication of deportation proceedings by IJs and the BIA. Because of this jurisdictional defect, if the Court granted review in this case, it

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1998), and Vengadasalam does not have such a close relative who is a citizen or LPR.

could not, in our view, grant petitioners the relief they now seek.

In any event, petitioners' due process claim is without merit. Petitioners strive to frame this case as involving a right to procedural due process in the deportation context, but they overlook the fact that the stop-time rule does not regulate the *procedure* for applying for suspension of relief. Rather, IIRIRA § 309(c)(5) changed the terms of aliens' statutory *eligibility* for that relief. Plainly, Congress has very broad authority to establish the substantive bases on which aliens may obtain discretionary relief from deportation. See *INS* v. *Phinpathya*, 464 U.S. 183, 195-196 (1984). Thus, to establish a due process violation, petitioners must show that the Constitution itself provided them with an interest in obtaining suspension of deportation without regard to the stop-time rule (*i.e.*, as long as they had been present in the United States for seven years before issuance of the final order of deportation) sufficient to warrant protection by the Due Process Clause.

This Court's decisions offer no support for such a proposition. To be sure, petitioners have a constitutionally protected liberty interest in avoiding deportation, and so their deportation proceedings must be conducted according to principles of due process. But petitioners have not argued that the procedures used by the immigration judges and the BIA to hear any contentions about their deportability, or even suspension of deportation or any other form of relief that might have been available to them, were fundamentally unfair. Rather, they have argued that they have a *separate* constitutionally protected interest in applying for suspension of deportation under the terms that were available to them before Congress enacted the stop-time rule of IIRIRA. But this Court has firmly rejected the contention that the Due Process Clause constrains Congress's power to make alterations in the terms on which individuals may obtain benefits from the government. See, *e.g.*, *Atkins* v. *Parker*, 472 U.S.

115, 129-130 (1985). Although the Court's decisions on that point have generally arisen in the context of public welfare benefits (see *id.* at 130 n.32), their reasoning applies with full force to discretionary relief from deportation, which this Court has consistently understood to be essentially an "act of grace" that resides in the "unfettered discretion" of the Attorney General (bounded, of course, by the terms of eligibility set by Congress). See *INS* v. *Yeuh-Shaio Yang*, 519 U.S. 26, 30 (1996); *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). Petitioners' argument, if accepted, would constrain Congress's ability to alter the grounds on which aliens may be deported or granted relief from deportation, a matter that this Court has viewed as part of Congress's plenary power to regulate immigration. See *Phinpathya*, 464 U.S. at 196; cf. *Fiallo* v. *Bell*, 430 U.S. 787, 798 (1977).

To put the matter another way, petitioners' due process claims fail because, to establish the existence of their asserted constitutionally protected interest, they must show both that they are eligible for the relief sought (suspension of deportation) and that they would be entitled to receive such relief. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 60-61 (1999). Petitioners can clear neither hurdle in this case. Congress has declared (subject to exemptions created by NACARA, discussed at pp. 10-12, *supra*) that petitioners are ineligible for suspension of deportation because of the stop-time rule, and the Constitution itself does not suggest in any way that the stop-time rule is of questionable validity. Nor can petitioners establish that they have any *entitlement* to suspension of deportation sufficient to create a liberty or property interest protected by the Due Process Clause. Suspension of deportation resides in the discretion of the Attorney General. Accordingly, petitioners have no basis for a due process challenge to Congress's alteration of the terms on which aliens are eligible for suspension of deportation. Cf. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 464-466 (1981)

(concluding that inmates in Connecticut had no entitlement to pardons, and therefore no liberty interest protected by due process in obtaining pardons, because the State had given its Board of Pardons "unfettered discretion" to determine whether any particular inmate should be granted a pardon).[14]

Petitioners attempt to establish a due process claim by arguing that they are seeking to vindicate a "right to apply" for discretionary suspension of deportation (Pet. 11-13). But since petitioners have no liberty or property interest in suspension of deportation on the substantive terms on which it was available before Congress enacted IIRIRA, petitioners have no separate constitutionally protected interest in the process for applying for suspension. As the Seventh Circuit observed in *Shvartsman* v. *Apfel*, 138 F.3d 1196 (1998), when one has no constitutionally protected interest in receiving a benefit, one also has no constitutionally protected interest in a particular process for proving entitlement to

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[14] Petitioners err in arguing (Pet. 11-12) that *Ponte* v. *Real*, 471 U.S. 491 (1985), modified the principle underlying the Court's decision in *Dumschat*. *Ponte* involved prisoners' constitutionally protected liberty interest in good-time credits, an entitlement that prisoners received based on their good behavior in prison. Petitioners, however, do not have and never had an entitlement to suspension of deportation. Similarly, petitioners' reliance (Pet. 11) on *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is wide of the mark. In *Accardi*, the Court held that the Attorney General was required to follow his own regulations in ruling on applications for suspension of deportation, which required that the BIA exercise its own judgment in adjudicating aliens' applications for suspension. *Id.* at 265-268. *Accardi* was not expressly decided on a due process ground and is not framed in modern concepts of liberty and property interests. Moreover, as we have explained, this case does not involve procedures, and it certainly does not involve the Attorney General's failure to abide by her own regulations, as was the case in *Accardi*. The applicable law here is supplied not by regulation but by an Act of Congress—the stop-time rule of IIRIRA—and the Attorney General is following that law.

that benefit. "[D]efining access to procedures as a protectable property interest would eliminate the distinction between property and the procedures that are constitutionally required to protect it." *Id.* at 1199. Likewise, this Court has explained that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983).[15]

Nor is a different result compelled because the INS encouraged the Nicaraguan petitioners to apply for suspension of deportation, or because petitioners paid a fee when they did so. The payment of an application fee did not provide petitioners with a guarantee that their applications would be adjudicated under the substantive terms that governed suspension of deportation when those applications

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[15] Petitioners seek to rely (Pet. 13) on *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982) (*HRC*), to substantiate their claim of a "right to apply" for suspension of deportation. *HRC*, however, involved the rather different context of applications for asylum, and held only that, having created a procedural mechanism to apply for asylum, the government could not then make resort to that mechanism "utterly impossible" by instituting meaningless procedures. *Id.* at 1039. *HRC* was subsequently limited in *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985), which held that the government had no constitutionally based obligation to advise aliens of the opportunity to apply for the discretionary grant of asylum and emphasized (in language directly relevant here) that, "when dispensation of a statutory benefit is clearly at the discretion of an agency, or when a statute only provides that certain procedural guidelines be followed in arriving at a decision, then there is no creation of a substantive interest protected by the Constitution." 727 F.2d at 981. Moreover, in this case the government has not made it impossible for petitioners to apply for suspension of deportation; rather, IIRIRA made them ineligible for that relief. The appropriate analogy would be if Congress had enacted a statute constraining the terms on which aliens might be granted asylum in the discretion of the Attorney General. *HRC* did not suggest that such a statute would be unconstitutional.

were filed. If, for example, the BIA had altered some aspect of its decisional law governing suspension of deportation in a manner adverse to petitioners while those applications were pending, petitioners surely could not contend that the BIA was prohibited by principles of due process from applying that change in decisional law to their cases. The same would be true if the federal courts had issued a ruling on suspension of deportation that was generally adverse to aliens and led the BIA to apply a more restrictive approach to that form of relief. So too, the mere fact that petitioners paid a fee cannot prevent Congress from enacting changes to the law, even changes that govern applications for relief that are already pending at the time the law is changed.[16]

There is also no basis for petitioners' argument that the INS induced them to abandon their applications for asylum and thereby created a constitutionally protected interest in having their applications for suspension of deportation adjudicating according to particular terms. In the first place, the record shows that public announcements made by the INS in connection with the termination of the special review program for Nicaraguans made clear that Nicaraguans fearing persecution had the continuing right to pursue asylum applications as well as motions to reopen to pursue suspension of deportation. See Complaint Exhs. 2, 4. And

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[16] Although petitioners rely on *Furlong* v. *Shalala*, 156 F.3d 384 (2d Cir. 1998), to support their claim, that case is plainly distinguishable. *Furlong* involved a suit by doctors who had declined assignment for Medicare payments, challenging as a violation of due process the Secretary of Health and Human Services' failure to provide them with any mechanism for administrative appeal of a fiscal intermediary's decision to set reimbursement for procedures at a particular rate. The court of appeals held that the doctors had a property interest in receiving payment for services rendered at the proper rate. *Id.* at 392-396. This case, however, does not involve the payment of money for work done. Rather, it involves only the authority of Congress to prescribe the eligibility requirements for discretionary relief from deportation.

even if Nicaraguan members of the class mistakenly abandoned their asylum applications to pursue suspension of deportation, that fact could not have created a constitutionally protected interest in obtaining suspension of deportation on the terms governing that form of relief at that time. The INS is simply not empowered to bind Congress or the BIA to authorizing suspension of deportation on particular terms. There is no basis for concluding that the INS made a guarantee to Nicaraguans that their suspension of deportation applications would be reviewed favorably by the BIA, or that it could have legally done so.[17]

3. Petitioners also argue (Pet. 16-20) that the INS should be estopped from applying the stop-time rule of IIRIRA § 309(c)(5) because it previously encouraged Nicaraguans to apply for suspension of deportation and accepted their application fees, even though it knew that Congress might enact the stop-time rule that subsequently rendered them ineligible for suspension. Petitioners also urge the Court to decide whether a party seeking to invoke estoppel against the government must show affirmative misconduct on the part of the government, and if so (or even if not), whether the government's alleged actions in encouraging Nicara-

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[17] Petitioners suggest (Pet. 14) that the INS was under a constitutional obligation to advise Nicaraguans either that they should continue to pursue their asylum applications, or that Congress might later alter the terms on which suspension would be unavailable. There is no support for that contention, and a similar one was rejected by the Eleventh Circuit in *Jean*, *supra*, 727 F.2d at 981. *Asani* v. *INS*, 154 F.3d 719, 726-728 (7th Cir. 1998), held only that IJs must follow the Attorney General's regulations requiring them to advise potentially eligible aliens at their deportation hearings of the opportunity to apply for suspension of deportation. *Andriasian* v. *INS*, 180 F.3d 1033, 1041 (9th Cir. 1999), stated that an alien may not be surprised at his asylum hearing with an issue of which he had no previous notice. Neither case suggests that the INS must affirmatively advise large classes of aliens of their right to apply for asylum or that the terms governing suspension of deportation may be altered by Congress.

guans' suspension applications warrant estoppel. This case, however, is not an appropriate vehicle for resolution of any broad questions about the availability of estoppel against the government, for it is clear that under any standard there is no basis for estoppel in this case.

Although the Court has noted that it is questionable whether estoppel may ever lie against the government, see *OPM* v. *Richmond*, 496 U.S. 414, 423 (1990), it has made clear that, "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 61 (1984). Thus, the party claiming estoppel against the government must show at a minimum that the government misrepresented the law, that the party relied to its detriment on the misrepresentation, and that such reliance was reasonable. *Ibid.* In this case, there was no misrepresentation; the INS never suggested to petitioners or other Nicaraguan nationals that Congress would not change the law governing suspension of deportation. Nor is there any basis for petitioners' charge (Pet. 14) that the government was encouraging Nicaraguans to apply even while it was lobbying Congress for the changes to the INA that rendered petitioners ineligible for suspension. As we have explained (pp. 5-7, *supra*), the Department of Justice did not support the application of the stop-time rule to already-pending cases, and it pointed out to Congress that such application to pending cases would make ineligible aliens who had already applied for relief. Thus, while the Department did generally support the new stop-time rule enacted in IIRIRA, insofar as it was to be applied to future proceedings, it did not request that Congress direct that the rule be applied to pending cases, including petitioners' applications.

There is also no basis for estoppel in petitioners' contention (Pet. 18) that the INS was aware that changes in the

law were looming but failed to inform petitioners of that potentiality. In the first place, as the court of appeals observed (Pet. App. A33), "Congress sometimes appears likely to do things it never actually does," and the INS cannot predict with certainty whether or when changes to the immigration laws will be enacted. Moreover, the Court has already concluded that misinformation provided by federal employees to private persons about the *current* state of the law will not form the basis for estoppel. See *OPM* v. *Richmond*, 496 U.S. at 423; *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961). It follows *a fortiori* that the INS's failure to inform petitioners about a potential future change in the law that might be enacted by Congress and that might affect their eligibility for relief from deportation could not form a basis for estopping the government from applying that change in the law once Congress enacted it and expressly directed that it be applied to pending cases.[18]

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[18] For the convenience of the Court, we have lodged with the Clerk the following materials referred to in this brief: Complaint, with Exhibits 1-4; Resp. Exh. B2 (letter from Assistant Attorney General Andrew Fois to Rep. Lamar S. Smith (July 12, 1995)); Resp. Exh. B3 (letter from Deputy Attorney General Jamie S. Gorelick to Rep. Henry J. Hyde (Sep. 15, 1995)); Resp. Exh. B4 (letter from Deputy Attorney General Jamie S. Gorelick to Rep. Richard A. Gephardt (Mar. 13, 1996)); Memorandum from INS General Counsel Paul W. Virtue, on the Administrative Closure of EOIR Proceedings for Aliens Eligible for Repapering (Dec. 7, 1998); Memorandum from INS General Counsel Owen Cooper, on the Administrative Closure of EOIR Proceedings for Non-Lawful Permanent Resident Aliens Eligible for Repapering (Dec. 7, 1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ROBERTO TEFEL, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF PETITION

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ARGUMENT

The Government's response largely ignores Petitioners' showing that the Eleventh Circuit's opinion (1) contradicts prior rulings by this Court as to Petitioners' due process claim; (2) misapplies the estoppel precedent of this Court; and (3) conflicts with the estoppel jurisprudence of other Circuits. Instead, the Government devotes the bulk of its brief to an irrelevant discussion of the status of the individual claims of the named class representatives. Petitioners are a certified class of 40,000 plaintiffs, who continue to suffer the threat of deportation and other related harms. The Government's suggestion that this Court's certiorari review should turn upon an examination of claims of certain of the class representatives ignores this Court's explicit precedent making clear that the claims of the class members survive the purported resolution of any individual claims and remain worthy of this Court's review.

The Government's attacks upon the substance of Petitioners' claims are no more well-grounded. Just as the Eleventh Circuit did, the Government turns this Court's precedent on its head to suggest that it bars Petitioners' procedural due process claim when in fact it squarely supports it. As to Petitioners' estoppel claim, the Government entirely declines to address Petitioners' rebuttal of the single basis on which the Eleventh Circuit denied this claim. Moreover, it simply ignores the conflicts in the law of estoppel arising between the Eleventh Circuit's application of the law and that of several other Circuits.

1. The Government's Untested Appellate Assertion That Some (But Not All) Of The Class Representatives May Have Individually Obtained Relief Is Irrelevant And Does Not Denigrate The Continuing Legal Importantce Of This Case.

The Government devotes the bulk of its response to a suggestion that the validity of Petitioners' claims is somehow

reduced because some (albeit unquestionably not all) of the named class representatives allegedly may have been awarded some form of relief. This contention is meaningless to this Court's decision to grant certiorari, because (1) the class's claims survive any individual relief to the named representatives, and (2) the Government admits that some of the named representatives have not resolved their claims.[1]

a. Under This Court's Precedent, The Claims Of The 40,000 Class Members Remain Fully Active And Justiciable Even If Some Of The Individual Class Representatives Have Been Mooted

Under the explicit precedent of this Court established in *Sosna v. Iowa*, 419 U.S. 393 (1975), the Government's remarks that relief may have been obtained by some of the named class representatives are irrelevant to this Court's decision to award certiorari in this case. *See* Government Response ("Resp.") at 14-16. *Sosna* squarely held that an action brought by a certified class of plaintiffs survives the mooting of a named class representative's claims. This Court stated specifically that an Article III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Sosna*, 419 U.S. *Id.* at 402. In *United States Parole Comm'n v. Geraghty*, the Court extended the rationale of *Sosna* to cases in which class certification has been denied. 445 U.S. 388, 404 (1980). In this case, of course, the Petitioners constitute a duly certified class, so the class's claims plainly survive any resolution of the individual representatives' claims, under *Sosna*. Moreover, even if the class certification is as flawed as the Government alleges (but Petitioners dispute), this Court's holding in *Geraghty* unquestionably states that the

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[1] Moreover, the Government's remarks as to the relief obtained by some of the named class representatives do not rely upon any evidence properly introduced at trial. These assertions were only introduced as the arguments of counsel on appeal, and they thus carry no weight.

claims of the Petitioners' class are still fully worthy of certiorari.

This Court recently reiterated the principles that animated *Sosna* and *Geraghty*, noting that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 120 S. Ct. 693, 709 (2000). The Government has not even attempted to make any such showing in this case. Plainly, the district court recognized that the 40,000 Petitioners in the certified class faced enormous harm beyond the individualized claims of the named class representatives. It found "powerfully persuasive" the claims detailed in its opinion as representing "a cross-section of the Plaintiff class. There are thousands of other cases that could be developed at the ultimate trial in this case." Petition Appendix ("Pet. App.") B at 83a. That court was fully aware that the relief afforded to some of the individual named Petitioners is hardly indicative of the treatment of the class as a whole. The district court specifically found that "The Defendants have respectfully, but forcefully, made it clear that they will continue to deport class members." *Id.* at 84a. Moreover, the class of 40,000 Petitioners has suffered other unredressed harms besides the threat of deportation, in such forms as denial of access to employment while proceedings were pending, expiration of claims by aged-out parties, and inability to pursue claims or benefits on behalf of family members.

Finally, Defendants' arguments are an invitation to abuse of the class action form. If they prevail, any defendant facing class litigation could escape accountability to the class by granting even small relief to the representatives.

b. As The Government Itself Concedes, At Least Two Of The Individual Class Representatives Indisputably Remain Active Plaintiffs

Even if the status of the individual class representatives' causes of action were in some way relevant to the Court's decision to grant certiorari in this matter, it is clear from the Government's own brief that this point is a diaphanous issue. Concededly, at least two of the named class representatives have not obtained any form of relief from deportation. Resp. at 14, 16.

Indeed, the district court had examined the claims of the named class representatives at length in its opinion, *including one of the individuals whom the Government admits is still facing deportation*, and found that each one had asserted valid claims through which to seek suspension of deportation. Pet. App. B at 74a-84a. The district court specifically described the situation faced by Ms. Khadijeh Aidinezhad, one of the two individual class representatives whose claims the Government admits are still unquestionably unresolved and unredressed. It noted that the "attorney for INS agreed that Ms. Aidinezhad would suffer extreme hardship if deported to Iran." The district court further found that Ms. Aidinezhad was an adequate class representative, because, *inter alia*,

> Ms. Aidinezhad is the sole care-giver and financial provider to her 79-year-old mother, a U.S. resident . . . Ms. Aidinezhad's mother requires constant medical attention and care and relies entirely on Ms. Aidinezhad to provide her with basic necessities and medicine . . . Ms. Aidinezhad hoped to continue her education in the United States and complete her master's degree, an option not available to women in Iran.
>
> If Ms. Aidinezhad is deported, she will lose the chance to continue her education, and more importantly, her elderly and dependent mother will

> lose the only financial support and care giver she has.

Id. at 79a. There has been no showing that any of these facts have changed. The same remains true for Subalecthumy Vengadasalam, the other named class representative conceded by the Government still to be in danger of deportation. *See* Resp. at 19 n.13. Even if this Court were inclined to review the status of the named class representative, the adequacy of those representatives is not in doubt.

2. The Government's Response Fails To Overcome Petitioners' Showing That They Have Raised A Valid Due-Process Claim Worthy Of This Court's Review

a. The Government's Response Misstates The Holding In *Dumschat*, Where This Court Squarely Stated That Due Process Protection Can Attach To The Right To Seek A Benefit, Even If The Award Thereof Is Discretionary

The Government's response attempts to craft a new due process rule in conflict with this Court's jurisprudence by ignoring the clear language of *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981). Repeating the error made by the Eleventh Circuit, the Government simply posits without support the notion that, because Petitioners do not have a due process right to *obtain* suspension of deportation, they must therefore have no protectable right to *seek* suspension. Resp. at 23. *Dumschat*, respectfully, reached precisely the opposite conclusion.

As Petitioners noted in their Petition, the Court in *Dumschat* affirmed the legal basis for distinguishing between the right to receive relief and the property or liberty interest in the right to seek relief: "We hold that the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents beyond *the right to seek* commutation." Petition ("Pet.") at 11; *Dumschat* at 467 (emphasis added). Petitioners further showed that, in so ruling, *Dumschat* was one of a string of cases reaching

essentially this conclusion. Pet. at 11; *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *United States v. Nixon*, 418 U.S. 683, 695-69 (1974); *Ponte v. Real*, 471 U.S. 491, 498-99 (1985). The Government's attempt to distinguish some of these cases simply reiterates the same fallacy it made in discussing *Dumschat*, by incorrectly equating the right to obtain relief with the right to seek it.[2] Resp. at 23 n.14.

Moreover, Petitioners demonstrated that the Eleventh Circuit's opinion was both contrary to all of these cases from this Court and sharply at variance with cases from other Circuits. Pet. at 13-14. The Government attempts to address only a few of these cases and to distinguish them on factual grounds, but it cannot escape the clear holdings of these cases, which harmonize with *Dumschat*.[3]

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[2] For the same reason, the various cases cited by the Government in support of the proposition that Petitioners have no due process right to *receive* suspension of deportation are irrelevant to this Court's decision as to the granting of certiorari, because the right to receive suspension was and is, simply, not the issue in either *Dumschat* or this case. *See* Resp. at 21-22.

[3] The only case that the Government cites for of its suggestion that due process cannot attach to a right to seek a benefit is *Shvartsman v. Apfel*, 138 F.3d 1196 (7th Cir. 1998). The Seventh Circuit's opinion, of course, is not controlling upon this Court, and it is significantly limited in its analysis, insofar as it entirely fails to mention *Dumschat* or *Ponte*. Nonetheless, even *Shvartsman* recognized that, upon a sufficient showing of a property interest, due process protection can attach to particular procedures for seeking benefits. *Id.* at 1200. In that case, the plaintiffs were not able to show any such property interest, whereas the Petitioners in this case have presented considerable evidence of fees paid and worthwhile claims relinquished in order to seek suspension.

b. As The Eleventh Circuit And The District Court Found, The Petitioners' Claim Sounds In Procedural Due Process, Because The Harm Stems From The Government's Decision To Assign A Different Legal Significance To The Issuance Of An INS Order

The Government attempts to confuse the issue tendered for this Court's review by seeking, in contravention of the findings of both the Eleventh Circuit and the district court, to characterize Petitioners' due process claim as arising from "substantive," as opposed to procedural, due process. Resp. at 21. On its face, this suggestion is belied by the facts of this case. Petitioners' claims for relief, after all, arise from the Government's decision to assign a different legal significance to the Government's procedural act of sending an Order to Show Cause to Petitioners. Pet. App. B at 67a. In other words, as the district court found, the due-process "analysis . . . turns on whether someone is served with a charging document." *Id.* This is plainly a procedural distinction.

The Eleventh Circuit reached the same conclusion and squarely rejected the Government's contention. The section of its opinion dealing with Petitioners' claims is entitled "Procedural-Due-Process Claim," and the first sentence thereof analyzes "the procedural component of the Fifth Amendment's Due Process Clause." Pet. App. A at 24a, 27a, 28a.

c. The Statutory Change Referred To In The Government's Response Did Not Abrogate Petitioners' Property Interest, Because They Had Already Paid Over $1.7 Million In Fees And Had Abandoned Other Claims For Relief

The Government's response attempts to suggest that Petitioners have demonstrated no property interest protectable by due process. Resp. at 24-25. The district court, however, made extensive findings establishing protected property interests. It found that, collectively, individuals in the plaintiff

class had paid the Government over $1.7 million in fees seeking suspension of deportation, before the Government changed the stop-time rule and retroactively sought to bar these Petitioners from pursuing relief. Pet. App. B at 64a. It also found that many of the Petitioners abandoned other legal claims in order to pursue suspension. For instance, the district court noted with regard to one of the named class representatives that "[b]efore the Immigration Judge reviewed Ms. Aidenezhad's application for asylum, Ms. Aidenezhad withdrew her application for asylum and applied for and was granted suspension of deportation." *Id.* at 79a. These substantial payments and sacrifices, undertaken at the Government's encouragement, were held in the district court to have vested valuable property interests, protectable by procedural due process, in the 40,000 individuals in the class. *Id.*

3. The Government's Response Fails To Overcome Petitioners' Showing That They Have Raised Valid Estoppel Claims Worthy Of This Court's Review

a. The District Court Expressly Found That Petitioners Had Demonstrated A Likelihood Of Success on The Traditional Elements Of Estoppel, And The Eleventh Circuit Did Not Disturb That Holding

The Government's only response to the Petitioners' arguments in favor of certiorari on their estoppel claim attempts to raise an issue that even the Eleventh Circuit did not find persuasive: the suggestion that the traditional elements of estoppel are not present. Resp. at 27-28. This contention has no record support; the district court analyzed at great length each of the elements traditionally necessary to an estoppel claim and found that Petitioners had demonstrated a likelihood of success on every element. Pet. App. B at 68a-74a. The Eleventh Circuit apparently agreed, as it left these findings undisturbed. *See, e.g.*, Pet. App. A at 30a.

b. The Government's Response Fails To Address Petitioners' Showing (1) That The Eleventh Circuit Erred In Concluding That An Element Of "Affirmative Misconduct" Was Required By This Court's Precedent And (2) That It Misapplied That Element In Conflict With The Law In Other Circuits

The Government apparently concedes the Petitioners' central argument for certiorari on their estoppel claim by offering no response. As Petitioners pointed out, the Eleventh Circuit overturned the injunction as to Petitioners' estoppel claim on the sole grounds that, as a matter of first impression in that Circuit, this Court's jurisprudence required a showing of "affirmative misconduct" to estop the Government. Pet. at 16. Despite the absence of any findings by the district court, the Eleventh Circuit found that element lacking in this case as a matter of law.

As a threshold matter, Petitioners demonstrated that this Court's precedent did not require "affirmative misconduct" by the Government beyond the traditional elements of estoppel. Pet. at 17. Rather, this Court has explicitly declined to adopt an affirmative-misconduct element. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990).

Even if some form of "affirmative misconduct" were necessary to estop the Government as a general rule, Petitioners further showed that the Eleventh Circuit's application of that element was both erroneous under the circumstances of this case and in conflict with the manner in which several other Circuits had applied it. The Government did not address this point in its Response. Simply, the Second, Third, and Ninth Circuits had defined "affirmative misconduct" as including omissive conduct (such as the INS' failure to advise the Petitioners in this case) where an individual loses a right to benefits. *See* Pet. at 17-18. The First and Ninth Circuits additionally based the determination of affirmative misconduct upon a *factual* evaluation, which the Eleventh Circuit ignored by ruling, in the absence of

factual findings by the district court, that affirmative misconduct was not established as a matter of law. *See* Pet. at 19. Earlier, the Seventh Circuit ruled that affirmative misconduct may be found even if the Government did not violate its own applicable regulations. *See id.* These variant standards produce sharply differing results. They make certiorari as to Petitioners' estoppel claim appropriate in the interest of clarity, fairness and uniformity. *Barrett v. United States*, 423 U.S. 212, 215 (1976) (certiorari appropriate in case revealing "overtones of conflict" among the Circuits).

CONCLUSION

For the foregoing reasons, and for all of the reasons set forth in their Petition, Petitioners respectfully request that a writ of certiorari be issued to the U.S. Court of Appeals for the Eleventh Circuit.

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